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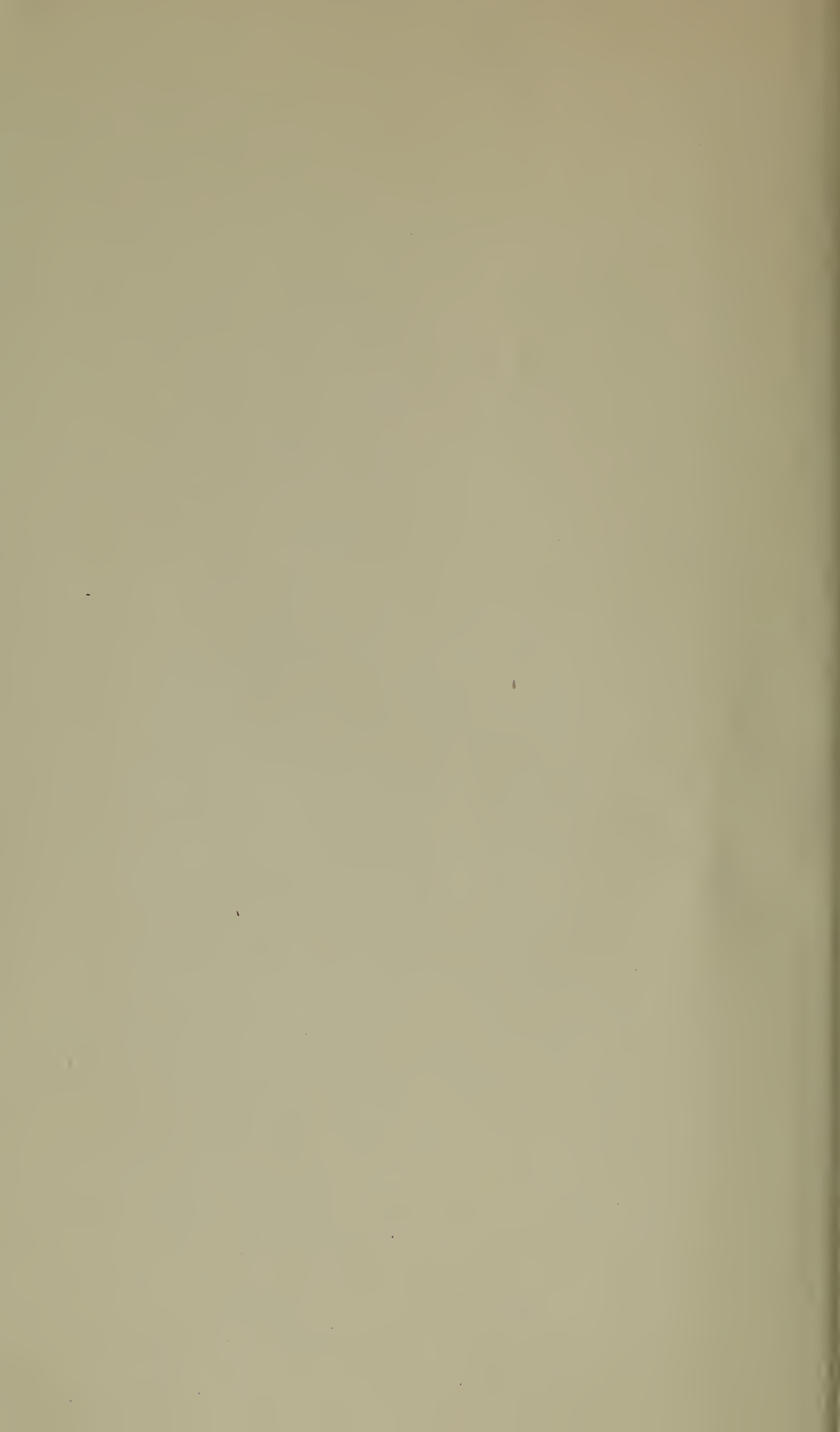
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1496

No. 12956

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CLARENCE W. MOSELEY,

Appellant,

vs.

CLARENCE C. MOSELEY, EDWARD S. FRANZUS, SANITEK
PRODUCTS, INC., a corporation, and 111 SOUTH GAREY
CORPORATION, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

WILLIAMSON, HOGE & CURRY,
417 South Hill Street,
Los Angeles 13, California,

Attorneys for Plaintiff and Appellant
Clarence W. Moseley.

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APPELLANT'S OPENING BRIEF.

Jurisdiction.

The jurisdiction of the District Court in this case depended upon diversity of citizenship. (28 U. S. C. A. 1332.) A final judgment was rendered by that Court, which this Court has jurisdiction to review. (28 U. S. C. A. 1291.)

The amended complaint alleges that plaintiff is a citizen of the State of Oklahoma. [Tr. p. 4.] This allegation was denied for lack of information, but the uncontradicted evidence establishes the fact. [Tr. p. 47.] The amended complaint also alleges that defendants Lawrence C. Moseley and Edward S. Franzus are citizens of the State of California, and that defendants Sanitek Products, Inc., and 111 South Garey Corporation are California

corporations. [Tr. p. 4.] The answers of the defendants admit these allegations. [These answers were not printed, but appear at pp. 17, 24, 35 and 39 of the typed record certified by the Clerk of the District Court.]

The fact that the amount in controversy exceeds the jurisdictional amount of \$3,000.00 is shown by the fact that the plaintiff, the appellant here, recovered judgment for \$26,150.70, plus costs. [Tr. p. 37.]

Statement of Facts.

This is an action by a partner for an accounting following dissolution of the partnership. More accurately put, it is an action by a sub-partner for an accounting upon the dissolution of the main partnership and the sub-partnership. The plaintiff also charges a breach of trust, and seeks a determination of the remedies available to him as beneficiary of the trust. The case comes up on an appeal by the plaintiff from a judgment in his favor.

In 1941 the plaintiff and appellant Clarence W. Moseley and his brother, the defendant and appellee Lawrence C. Moseley, made an investment in the stock of Gerson-Stewart Pacific Corporation, which was carrying on the business of manufacturing and selling soaps and sanitation chemicals in Los Angeles, and they purchased additional stock of the company in 1943. In 1943 the corporation was dissolved, and its assets distributed in equal shares to the defendants and appellees Lawrence C. Moseley and Edward S. Franzus, who thereafter conducted the business as partners, under the name of Sanitek Products Company. The original investment, as well as the consideration for the additional stock, was contributed by the two brothers equally. One-half of the total consideration for the partnership interest taken in the name of defendant

and appellee Lawrence C. Moseley had been contributed by plaintiff and appellant Clarence W. Moseley.

In 1945, a written agreement [Tr. p. 16] was entered into between the plaintiff Clarence W. Moseley and the defendant Lawrence C. Moseley reciting the foregoing facts, and providing that the defendant Lawrence C. Moseley would hold in trust, for himself and the plaintiff Clarence W. Moseley, his interest in said partnership with the defendant Edward S. Franzus.

Under this arrangement Lawrence was to receive seventy-five per cent of the earnings from the one-half partnership interest beneficially owned by the two brothers, and the plaintiff Clarence W. Moseley was to receive twenty-five per cent. In other words, the total earnings of the business were to go fifty per cent to the defendant Edward S. Franzus, thirty-seven and one-half per cent to the defendant Lawrence C. Moseley, and twelve and one-half per cent to the plaintiff Clarence W. Moseley. The agreement provided, however, that the interest in capital assets would remain fifty-fifty, each brother being the beneficial owner of fifty per cent of a one-half partnership interest in the business, or twenty-five per cent of the total capital, the other fifty per cent of the total being owned by Franzus. There was no provision as to how long the agreement would continue. This discrepancy in the sharing of earnings, notwithstanding the fact that the investment of the brothers was equal, is explained by the fact that Lawrence was active in the business, and agreed to devote his full time and attention to it. [Par. 4 of the agreement, Tr. p. 19.]

The defendant Edward S. Franzus, at all times knew that the plaintiff had an interest in the one-half interest

of the defendant Lawrence C. Moseley in the business. [Tr. pp. 30, 51, 55-56.]

In 1947 without the knowledge or consent of the plaintiff the main partnership was dissolved, the dissolution taking effect as of October 31, 1947. [Tr. p. 28.] Certain cash and accounts receivable, in the amount of \$51,-296.07, were distributed directly to the main partners, Lawrence C. Moseley and Edward S. Franzus [Tr. p. 29], and the remaining assets were transferred to two corporations, the stock of which was owned in equal shares by said Lawrence C. Moseley and Edward S. Franzus. Of the assets so transferred, the equipment, good-will, and the like went to defendant and appellee Sanitek Products, Inc., which is now carrying on the business. The real estate went to the defendant and appellee 111 South Garey Corporation, which leased it to the operating company, Sanitek Products, Inc.

The plaintiff, Clarence W. Moseley, first learned of these acts in a letter from his brother dated November 12, 1947, which stated that they had been accomplished. [Tr. pp. 30, 65-67, 68.]

The business has since been carried on by the corporations, or rather by one of them, Sanitek Products, Inc. The two former partners in the main partnership, Lawrence C. Moseley and Edward S. Franzus, own all of the stock, and each receives a salary.

The plaintiff did not receive any of the assets of the main partnership upon the dissolution thereof, and has not received any distributions from the business since. [Tr. p. 30.]

Questions Involved and How They Arise.

Plaintiff contends that the unauthorized transfer of assets to the two corporations constituted a breach of trust by the defendant Lawrence C. Moseley. This action was brought for an accounting, and to have such remedies for the breach of trust as the Court might determine.

The plaintiff has taken the position that he is entitled to a discovery of the earnings of the business from October 31, 1947, to date, and that he is not required to elect any remedy for the breach of trust until he has had an accounting in the sense of obtaining such information, but that if and to the extent that he is required to make any election, he wants an accounting in the sense of having his share of the distributions made to Lawrence C. Moseley from the business to date, determined in accordance with the 1945 agreement, and paid over to him.

The Trial Court held [Tr. p. 33] that on these facts the plaintiff was entitled to be paid the value of his interest in the business as of the date, October 31, 1947, when the main partnership was dissolved and the two main partners took the assets and transferred them (with the exception of certain cash and accounts receivable which they retained) to the two corporations owned by them, and that he had no other rights.

The value of plaintiff's share at October 31, 1947, was arrived at by stipulations of the parties, except for the value of the real estate and the goodwill of the business. The Court took evidence on the value of the last mentioned items, and made findings thereon, as to which no

question is raised in this proceeding. The parties also stipulated that \$750.00 was due to the plaintiff from the defendant Lawrence C. Moseley on an accounting of distributions received by Lawrence prior to October 31, 1947. Judgment was given in favor of the plaintiff for the composite amount so determined, without interest, from which plaintiff appeals.

The learned Trial Court further ruled [Tr. p. 33] that when the main partnership was dissolved, the trust agreement of 1945, under which Lawrence held his one-half share of that partnership in trust for himself and Clarence, likewise terminated. With this conclusion we have no quarrel.

The contention of the plaintiff which raises the main question for determination by this Court, is that upon the dissolution of the main partnership and the resultant termination of the subsidiary agreement, it was the duty of the defendant Lawrence C. Moseley, as trustee for the plaintiff, to cause an accounting to be had, and to distribute to the plaintiff his share of the assets of the business, and that if an agreement could not be arrived at among the three interested persons as to the proper distributive shares, a judicial winding-up should have been had (and could still be had, subject to the right of the plaintiff to elect other remedies, as hereinafter stated).

It is the further contention of the plaintiff that the transfer of the assets to the corporations without his consent was a breach of trust on the part of the defendant Lawrence C. Moseley, and that, at his election, the plain-

tiff is entitled to have (1) the value of his share in such assets at the date of such breach, together with interest thereon from such date, or (2) the present value of his share in the business, together with his share of the distributions to date, or (3) that he is entitled to disregard the conveyance to the corporations, and to have an accounting in the sense of having his share of the earnings of the business and any other distributions therefrom ascertained and paid over to him, and that this right will continue until the business is properly wound up by judicial proceedings at the suit of any partner. The plaintiff has made it clear throughout that if and to the extent that he is required to make any election before he is informed what the earnings have been since October 31, 1947, he will elect this third alternative. [Tr. pp. 54 and 76.]

Specification of Errors.

1. The Court erred in concluding from the foregoing facts that under the terms of the 1945 agreement [Ex. A of Amended Complaint, Tr. pp. 16-20], plaintiff and appellant Clarence W. Moseley had only the right to be paid the value of his share of the business as of October 31, 1947; that the plaintiff's prayer for an accounting from the defendant Lawrence C. Moseley for all distributions paid to said defendant from the assets and earnings of the business for any period of time after the incorporation thereof should be denied; and that plaintiff had no right to pursue the trust funds and properties in the

hands of Lawrence C. Moseley into the two new corporations, or to require of Lawrence C. Moseley any accounting for any funds or properties received as a result of this enterprise after October 31, 1947. [Conclusion of Law I, Tr. p. 33.]

2. The Court erred in failing to find or conclude that upon the dissolution of the partnership (thereby, in accordance with the holding of the Court [Tr. p. 33], terminating the agreement of August 31, 1945), plaintiff was entitled to an accounting, and to receive his share of the assets of the business, and that the use thereof by the defendant Lawrence C. Moseley and the other defendants for their own purposes, including the transfer of part thereof to the two corporate defendants, was wrongful as to the plaintiff, and was a breach of trust on the part of the defendant Lawrence C. Moseley in his capacity as trustee for the plaintiff.

3. The Court erred in failing to find or conclude that as remedies for such breach of trust the plaintiff could elect to:

(a) Recover the value of his share in the business at the date the property was converted by the trustee to his own use, October 31, 1947, together with interest on such sum at the rate of 7 per cent per annum from said date; or

(b) Recover the present value of his share of the business, together with his share of the distributions to date; or

(c) Disregard the incorporation of the business, and continue to receive his share of the distributions from the business in accordance with the 1945 agreement, until a lawful liquidation and winding-up of the business takes place.

4. The Court erred in failing to find or conclude that the plaintiff Clarence W. Moseley is entitled to financial statements showing the earnings of the business after October 31, 1947, and in failing to find or conclude that the plaintiff should have the right to elect his remedy for the breach of trust after obtaining such information.

5. The Court erred in refusing to allow interest at the legal rate on the value of plaintiff's share in the business at October 31, 1947.

6. The Court erred in the following finding contained in Finding No. VI of the Findings of Fact. [Tr. p. 30.]

“The defendant at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting.”

7. The Court erred in dismissing the action as to the defendants Edward S. Franzus, Sanitek Products, Inc., and 111 South Garey Corporation. [Tr. pp. 34 and 36.]

ARGUMENT.

I.

There Has Been a Breach of Trust by the Defendant Lawrence C. Moseley.

An analysis of the legal relationship between the parties may throw some light on the problem, although we submit that whatever view is taken of that relationship, it will necessarily be found that the defendant Lawrence C. Moseley had the obligations of a fiduciary to the plaintiff Clarence W. Moseley, that there was a breach thereof, and that the relationship was one of which the other defendants had knowledge, so that no transactions with them could cut off the plaintiff's rights in the property.

Initially, there was simply a joint venture between the brothers, in which they made a joint investment in stock of a corporation, Gerson-Stewart Pacific Corporation. When this corporation was dissolved, the defendant Lawrence C. Moseley and the defendant Edward S. Franzus, who was the other stockholder in the corporation, formed a partnership between themselves for the operation of the business, and the plaintiff allowed his share of the assets to go into this partnership. At this point we have a main partnership between Franzus and Lawrence, and a subpartnership between Lawrence and Clarence, the subject matter of which was a one-half interest in the main partnership.

The brothers operated under agreements which were oral or expressed in correspondence until the agreement of August 31, 1945, was entered into, which was the last one. [Tr. p. 45.] It took effect as of January 1, 1945. [Tr. p. 19.] By the terms of this agreement Lawrence

C. Moseley became an express trustee for himself and his brother, the plaintiff Clarence W. Moseley, the trust *res* being the one-half interest in the main partnership held by Lawrence C. Moseley.

At this point the substance of the relationship is still a sub-partnership between the brothers, but the form is that of an express trust. One of the sub-partners, Lawrence, who was a main partner and active in the business, had expressly declared himself a trustee of his entire interest in the main partnership. When the main partnership was dissolved, this relationship could no longer continue in any active sense, so that the sub-partnership and the trust were necessarily terminated.

When a trust terminates by the expiration of its term or otherwise, the trustee is not immediately divested of all duties. He has the obligation to distribute the property to the beneficiaries in accordance with their interests, and the trust continues until that is done, or at least the trustee's duties continue. As stated by Scott in his work on Trusts, Volume 3, at page 1889:

“When the time for the termination of the trust has arrived, the duties and powers of the trustee do not immediately cease, but until the trust is actually wound up, he has such duties and powers as are appropriate for the winding up of the trust. The trust ordinarily does not automatically terminate merely because the time for distribution has arrived; it is terminated only when the trustee has finally accounted and conveyed the trust property to the persons entitled to it on the termination of the trust.”

Also, in the Restatement of Trusts, Section 345, page 1070, Volume 2, appears the following:

“Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the

trust property to transfer the property to him or, if the trustee has possession but not title, to deliver possession to him."

The rule would be the same if we did not have in this case an express trust. When a partnership is dissolved, partners in possession are trustees for the other partners. (*Ruppe v. Utter*, 76 Cal. App. 19, 243 Pac. 715; *Kimball v. Baxter*, 67 Cal. App. 635, 228 Pac. 381.) As this Court said in *Pearson v. Higgins*, 49 F. 2d 47 (C. C. A. 9th, 1931), at page 49:

"A notice of dissolution by one partner to his co-partner does dissolve the partnership but does not terminate a partnership relationship."

In this case the trustee, Lawrence C. Moseley, was not in a position to deliver to his beneficiary and partner, Clarence W. Moseley, any assets in kind, except, of course, that he should have paid to him his share of the cash, which he did not do. [Tr. p. 29, Finding IV, and Finding VI, Tr. p. 30.] As to the remainder of the assets the trustee was in this position: He had a right to have the main partnership judicially wound up. The normal procedure and the procedure which he had a right to require, in the absence of agreement between the persons interested, was to have the business sold and the proceeds distributed in cash. (2 Bates on Partnership, 989-990; *Sigourney v. Munn*, 7 Conn. 324; *Harper v. Lamping*, 33 Cal. 641; *Ruppe v. Utter*, *supra*; Corporations Code, Sec. 15038.) The applicable portion of this section reads as follows:

"Sec. 15038. RIGHTS OF PARTNERS TO APPLICATION OF PARTNERSHIP PROPERTY. (1) When dissolution is caused in any way, except in contravention of the

partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to *pay in cash* the net amount owing to the respective partners.” (Italics ours.)

It would seem clear, on principle, that Lawrence, as trustee for the plaintiff, was required to exercise whatever rights he had for the protection of plaintiff's interest. This was a duty imposed by law as well as by the express terms of the agreement. Paragraph 4 of the 1945 agreement reads as follows:

“4. Lawrence C. Moseley agrees to devote his full time and attention to the business and affairs of said partnership, to diligently represent and protect the interest of himself and Clarence W. Moseley therein and to faithfully account to Clarence W. Moseley for the latter's share of the partnership share or interest so represented by him, together with all profits accruing thereto.”

See also paragraphs 2 and 3, with respect to his duties upon a distribution of assets or earnings being made. [Tr. pp. 18-19.]

If no agreement had been reached and Lawrence had exercised his rights as a partner for the benefit of himself and Clarence, as beneficiary of his trust, the business would have been sold at a judicial sale, and purchased by one or more of the partners, or by an outsider, Clarence would have received his share, the value of which would have been determined by the actual sale, and he would have had the opportunity to bid the price up to his own idea of its value, rather than having it fixed by someone else.

It is unfair to any partner to compel him to accept what someone else determines is the value of his interest. As said by the Court in the case of *Sigourney v. Munn*, cited above, 7 Conn. 324 at 329:

“Unless a settlement and division are agreed on, it contravenes every principle of natural justice, to hold, that one partner shall compel the other to accept what, according to the valuation, his interest is supposed to be worth.”

When the main partnership was dissolved, Lawrence failed to perform his duty of submitting the matter to his brother for his agreement as to the disposition of the assets, or, in the absence of agreement, insisting upon a winding up of the business. Instead, Lawrence took the high-handed procedure of simply appropriating the assets, transferring them to corporations which he and Franzus owned, and giving an ultimatum to Clarence as to what he could do. [Tr. p. 66.]

This was a violation of a fundamental rule of trust law, which is expressed in Section 2229 of the Civil Code, as follows:

“2229. TRUSTEE NOT TO USE PROPERTY FOR HIS OWN PROFIT. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.”

The rule of partnership law is the same. A partner in possession of the assets of a dissolved partnership cannot carry on the business for his own benefit, whether in corporate form or otherwise. (*Kimball v. Baxter, supra; Ruppe v. Utter, supra.*)

The question remains of what the plaintiff's remedies are, and of when he has to make an election between them.

II.

The Plaintiff Is Entitled at His Election to Any One of Three Remedies for the Breach of Trust.

A. One Remedy Is to Recover the Value of Plaintiff's Share in the Business at the Time of Its Wrongful Taking, With Interest From That Date.

Clearly one of the remedies is to have the value of plaintiff's share in the business at the time it was taken over by the defendants. This is what the Trial Court allowed, but that Court refused to allow interest, contrary to all the authorities which we have been able to find on the subject.

Even in a case where the trustee's only wrongdoing is to continue the operation of a business without authority, the beneficiaries have the option of holding him accountable for the net profits, or of charging him with the value of the property, and interest.

In 2 Scott on Trusts, at page 1099, the author states:

"Where the trustee continues without authority to carry on the business of the testator, the beneficiaries have the option of charging him with the value of the property so employed and interest, or of making him accountable for the net profits realized from carrying on the business. Before making their election they are entitled to an accounting with respect to the business."

The same rule is followed in partnership law. At 80 A. L. R., page 75, the author states:

"It is generally held, where the assets of a firm have been used by one partner in continuing the business after dissolution, that the other partner or his

legal representatives may take either the profits attributable to the use of his interest in the assets or interest on his share of the capital.”

The case of *Kimball v. Baxter*, 67 Cal. App. 635, hereinabove cited, is a square authority in California on the point. There, as here, the defendant repudiated his obligation to the plaintiff, and continued to carry on the business, transferring it to a corporation owned by him. This operation resulted in a loss, and the plaintiff elected to have the value of his share in the business at the time it was taken over by the defendant, with interest thereon. A judgment awarding him this relief was affirmed by the District Court of Appeal, and a petition for hearing was denied by the Supreme Court.

On the question of interest, the fact that the defendant Lawrence C. Moseley made a deposit, under Court order, of a sum of money before the judgment was rendered [Tr. p. 21], should not prevent interest from running upon the entire value of plaintiff's share in the business. There was no provision in the order, or otherwise, that the plaintiff could accept this money without prejudice to the right to claim a larger sum. Therefore it could not prevent the running of interest. (*Mutual Life Insurance Co. v. Wells Fargo Bank*, 86 F. 2d 585 at 588 (C. C. A. 9th, 1936).)

It may well be true that the plaintiff cannot claim any interest on the judgment from the date of its rendition, because at the time it was rendered an additional sum, making up the full amount thereof, was deposited in Court. Plaintiff has not been able to take down any part of that money, because he could not accept the benefit of the judgment without losing his right to appeal. On the

authority cited, however, it would seem clear that interest between October 31, 1947, and February 26, 1951, the date of the judgment, at the rate of 7 per cent per annum, must be included, if the plaintiff elects the remedy which the Trial Court has partially afforded him, or if this Court confines him to that remedy.

The amount on which interest should run is \$25,400.70. The additional amount of \$750.00 which was included in the judgment, bringing the total up to \$26,150.70, represents the balance due on a stipulated accounting under the 1945 agreement for periods prior to October 31, 1947.

B. The Plaintiff Should Have as an Alternative Remedy the Right to the Present Value of His Share, Together With His Share of Earnings to Date.

The beneficiary of a trust should not be limited to recovering the value of the property at the time of its wrongful appropriation by the trustee, with interest thereon. He should be allowed to have the present value of his share, if he desires it, together with his share of any profits which have been made in the interval. In other words, he should have the right to be put in the same position as if the breach of trust had not occurred. (2 Scott on Trusts, p. 1113, Sec. 208.3.) This option is also given to the beneficiary of a trust by Section 2237 of the Civil Code. That section reads as follows:

“2237. MEASURE OF LIABILITY FOR BREACH OF TRUST. A trustee who uses or disposes of the trust property, contrary to section 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest.”

C. The Third Remedy Is an Accounting.

Where, as here, the trust property can be restored, or its attempted disposal disregarded, the beneficiary is entitled to specific enforcement of the trustee's duties. (2 Scott on Trusts, 1077.) That would be in this case simply an accounting, partial or complete, *i. e.*, with or without a winding up of the business.

If there had been only two people interested, that is, if the plaintiff had been carrying on the business for the benefit of himself and his brother, the situation would be so clear that there could hardly be any argument about it. Does the fact that plaintiff was only a sub-partner in relation to the defendant Edward S. Franzus make any difference?

The plaintiff not only had the indirect right to an accounting through his trustee and partner, Lawrence C. Moseley, but, as a sub-partner, he had the right to a direct accounting. He was entitled himself, upon dissolution of the main partnership, or in any other circumstances which would render an accounting proper as between the main partners, to bring such an action, and to have an accounting for his share of the entire business. This would be true whether or not the other main partner knew about plaintiff's interest. (*Nirdlinger v. Bernheimer*, 133 N. Y. 45, 30 N. E. 561.) *A fortiori* he had the right to an accounting, when the other main partner knew that he had an interest. (*Lovejoy v. Bailey*, 214 Mass. 134, 101 N. E. 63; *Replogle v. Neff*, 176 Okla.

333, 55 P. 2d 436.) In this case the Court states at page 439 of the Pacific Reporter:

“A sub-partner may maintain an equitable action against the firm to determine his share in the portion due the partner with whom he contracted.”

At the time when the main partnership was dissolved, therefore, plaintiff, as a sub-partner, had the same right to an accounting as if he had been one of the main partners. He still has that right.

The only change which has taken place is that certain partnership assets have been transferred to the two defendant corporations [Tr. p. 78], and this was done without the plaintiff's consent. [Tr. p. 30.] These corporations are wholly owned by the two main partners, Lawrence C. Moseley and Edward S. Franzus, and they are directors and officers thereof. [Tr. p. 29.]

Franzus is chargeable with full knowledge of the relationship between the plaintiff and the defendant Lawrence C. Moseley. He knew that the interest which Lawrence had in the business was owned by Lawrence and Clarence, each having fifty per cent. [Tr. p. 56.] The fact that he did not know [Tr. p. 30] of the specific terms of the final agreement between the brothers, the written agreement of 1945, is immaterial. As said by the Court in *Sigourney v. Munn*, cited above, 7 Conn. at 333:

“Whatever is sufficient to put a person on enquiry, is considered in equity as conveying notice; as the law imputes to a person the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprised him.”

The knowledge of the officers and directors and only stockholders of the two corporations must, of course, be imputed to them. The corporations, therefore, stand in the shoes of the individual defendants. *Lovejoy v. Bailey*, *supra*, and see Section 2243 of the Civil Code, which reads as follows:

“2243. THIRD PERSONS, WHEN INVOLUNTARY TRUSTEE. Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration.”

The plaintiff's first cause of action is for an accounting. Upon the authorities hereinabove cited, a complete accounting would include the right to have the business wound up and all assets, or the proceeds of sale thereof, distributed to the partners. Plaintiff has not asked for such relief at this time, and none of the other partners has done so. On this branch of the case, the plaintiff has confined himself, so far, to requesting that there be a determination of his interest, and that there be paid over to him any distributions which have been made from the business and are in the hands of any of the other defendants, and should be properly paid to him. In other words, he seeks the same relief as was accorded to the plaintiff in *Replogle v. Neff*, 55 P. 2d 436 at 437.

In an accounting of earnings, the corporations should be disregarded and the situation treated as if the individual defendants had continued to carry on the business in partnership form. Salaries paid should be treated as a distribution to partners, and the matter of compensation for services should be determined by the Court. (*Love-*

joy v. Bailey, 101 N. E. 63 at 71.) (In this connection, while the agreement does not so provide, and the Trial Court would not receive evidence upon it, the reason for the division of the earnings from the brothers' one-half share of the business giving three-quarters thereof to Lawrence and one-quarter to the plaintiff Clarence, was to compensate Lawrence for his services. Plaintiff has no objection to such compensation being continued.)

This is the remedy elected by plaintiff if, and only if, he is required to elect in advance of having information as to the earnings of the business since the dissolution of the partnership on October 31, 1947.

III.

The Plaintiff Should Not Be Required to Elect His Remedy for Breach of Trust Until He Knows the Facts.

As shown above in the quotation from 2 Scott on Trusts at page 1099, when a trustee continues to carry on the business of a testator without authority, the beneficiaries, before making an election, are entitled to an accounting with respect to the business. The word accounting is here used in the sense of furnishing information. This should apply with greater force where there has been a repudiation of the trust and an adverse use of the business.

Wells Fargo v. Robinson, 13 Cal. 133, is a California case on the subject. There the defendant had embezzled

funds belonging to the plaintiff, and invested these funds in certain property. Plaintiff had filed an action at law to recover the money, and then filed this suit in equity to impose a trust upon the property which had been acquired with the embezzled funds. At page 142, the Court quotes Mr. Justice Story on the question of election:

“Questions have also arisen in Courts of Equity, as to the time when, and the circumstances under which, an election may be required to be made. The general rule is, that the party is not bound to make an election, until all the circumstances are known, and the state, and condition, and value of the funds, are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. If, therefore, he should make a choice in ignorance of the real state of the funds, or under misconception of the extent of the claims on the fund, elected by him, it will not be conclusive on him. And, on the other hand, he will be entitled, in order to make an election, to maintain a bill in equity for a discovery, and to have all the necessary accounts taken to ascertain the real state of the funds.”

It is submitted that the plaintiff should be entitled in this case to a discovery of the earnings of the business since it was wrongfully taken over by the defendants, and the present condition thereof, before he is forced to make an election.

IV.

Other Errors.

Turning now to some of the subsidiary assignments of error, the Court erred in its Finding No. VI, as follows:

“The defendant at all times was willing to fully account to plaintiff and to pay to plaintiff any sums found due on said accounting.” [Tr. p. 30.]

There is no dispute about the facts of this case, and this finding is assigned as error only because it may be given a broader meaning than it should have, “accounting” being a flexible term.

In Finding No. XI [Tr. p. 32], the Court found as follows:

“The defendant Lawrence C. Moseley has at all times been willing to account to the plaintiff for all distributions made to said defendant for the period prior to October 31, 1947, but has refused to account for any distributions made to said defendant on or after said date by the corporate success (*sic*) of the partnership, and has refused to furnish any financial statement of the business occurring since said date.”

The word “success” in the foregoing should obviously be “successor.”

This finding makes clear that there has been a refusal to account to plaintiff for the only period as to which there has ever been any real controversy, to wit, the period since October 31, 1947. Any possible doubt about this fact will be removed by reference to the colloquy between Court and counsel on the last day of the trial. [Tr. pp. 77-78.]

The Court erred in dismissing the action as to the defendant Edward S. Franzus and the defendant corpora-

tions. It may be that plaintiff will be content to have judgment, on one of the three theories discussed above, against the defendant Lawrence C. Moseley only. On the other hand, it is possible that the plaintiff will require a final and complete accounting in the sense of having the business wound up, and capital as well as earnings distributed. In that event the other defendants are necessary parties because they all have an interest in the property which is the subject of the action. (*Settembre v. Putnam*, 30 Cal. 490, at 497.)

Furthermore, if the plaintiff elects to have a judgment for the value of his interest in the business, past or present, this judgment might run not only against the defendant Lawrence C. Moseley, but also against the defendant corporations, as constructive trustees in possession of the assets. Mr. Scott takes the view that if the beneficiary does not wish the property, he can have judgment against the constructive trustee for its value, even though the constructive trustee still has the property and could return it, where, as here, the transferee knew that the transfer was in breach of trust, and that the trustee intended to misappropriate the property. (2 Scott on Trusts, 1608.)

Conclusion.

Summing up the case, it appears that there was a breach of trust on the part of the defendant Lawrence C. Moseley in transferring or joining in the transfer of partnership assets to the defendant corporations without plaintiff's consent; that the defendant Edward S. Franzus and the corporate defendants are chargeable with knowledge of such breach; that the plaintiff is entitled to a discovery of the earnings of the business since October 31,

1947, the date of such transfer to the corporations; and that he should thereafter have the right to elect any remedy which the law affords him for such breach of trust, including the following:

(1) To have judgment for the value of his share of the business as of October 31, 1947, determined in accordance with the agreement of 1945, together with interest on such value at 7 per cent from October 31, 1947; or

(2) To have judgment for the present value of his share of the business, together with his share of all distributions made from the business to the defendant Lawrence C. Moseley between October 31, 1947, and the date of the judgment, such share of present value and prior distributions to be determined in accordance with the 1945 agreement; or

(3) To have a complete or partial accounting, including the right to recover from the defendant Lawrence C. Moseley the sum of \$750.00, being the stipulated amount due to the plaintiff on such accounting before October 31, 1947, and plaintiff's share of all distributions from the business made by way of salary or otherwise to said defendant after October 31, 1947, the determination of plaintiff's share of capital or income in any such accounting to be in accordance with the 1945 agreement, and to be calculated as if the business had remained a partnership.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY,

By FULTON W. HOGE,

*Attorneys for Plaintiff and Appellant
Clarence W. Moseley.*

No. 12956

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE W. MOSELEY,

Appellant,

vs.

LAWRENCE C. MOSELEY, EDWARD S. FRANZUS, SANITEK
PRODUCTS, INC., a corporation, and 111 SOUTH GAREY
CORPORATION, a corporation,

Appellees.

APPELLEES' BRIEF.

JOSEPH C. SINGER,

325 West Eighth Street,
Los Angeles 14, California,

Attorney for Appellees.

POLLOCK & POLLOCK, and

EDWARD I. POLLOCK,

By EDWARD I. POLLOCK,

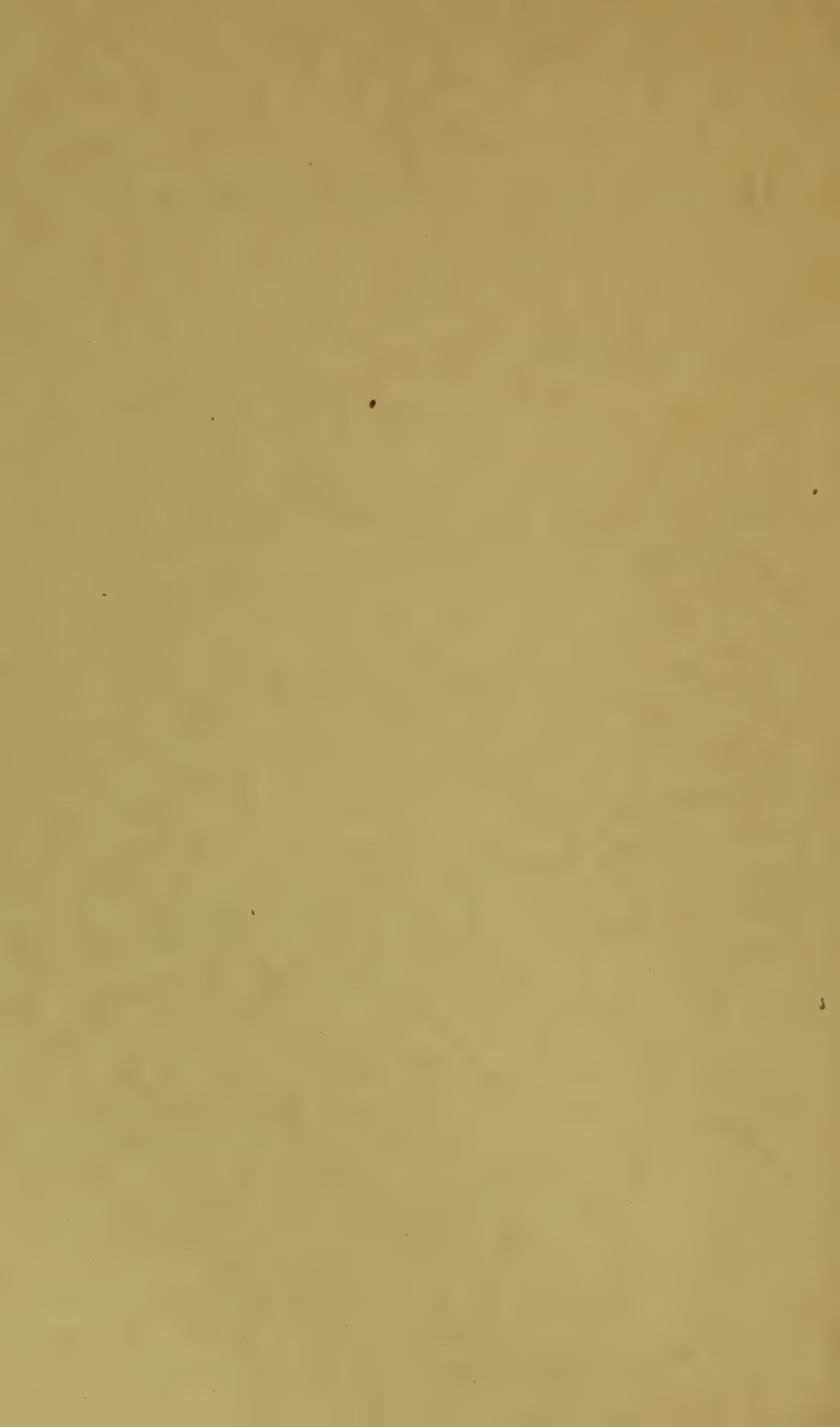
416 West Eighth Street,
Los Angeles 14, California,

Of Counsel.

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Upon the dissolution of the Lawrence-Franzus partnership the contract of August 31, 1945, between the plaintiff, Clarence, and the defendant, Lawrence, terminated, and plaintiff, Clarence, had only the right after an accounting from Lawrence, to be paid the value of his interest in the half share of Lawrence in the Lawrence-Franzus partnership, as of October 31, 1947, the date of its dissolution.....	9
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Appellees.

APPELLEES' BRIEF.

Jurisdiction.

Appellees hereby refer to the statement of Jurisdiction beginning on page 1 of Appellant's Opening Brief in this case, and by this reference incorporate the said statement of Jurisdiction herein as though it were fully set out herein.

Statement of the Case.

This is an action by the Plaintiff, Clarence W. Moseley, for an accounting, for breach of trust, for reformation of contract and for general relief, based upon a contract which Plaintiff had with his brother, Lawrence C. Moseley, one of the members of a partnership known as Sanitek Products Co., consisting of said Lawrence C. Moseley and

Edward S. Franzus. Said partnership was dissolved several years after the execution of said contract, but prior to the within action. Plaintiff concedes that at no time was he a member of such partnership. The trial court concluded that the said contract was free from ambiguity and was not entered into under mistake of fact or of law, and denied reformation thereof and held that plaintiff's rights were controlled and governed by its provisions; and that the said contract had been properly and lawfully terminated on October 31, 1947, on which date said partnership known as Sanitek Products Co., had been dissolved by its two sole members; and ordered that an accounting should be accorded plaintiff as of said date of October 31, 1947. Upon such accounting it was determined by the trial court that plaintiff was entitled to the sum of \$26,150.70, and accordingly it rendered judgment in favor of plaintiff and against the defendant, Lawrence, in the said sum, without interest, plus costs of suit of \$23.48, and dismissed the remaining defendants from the case.

The trial court found that the defendant, Lawrence, at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting; and that the amount of the judgment herein granted was at all times unliquidated until the trial of this action. Defendant, Lawrence, by a deposit with the trial court of said amount of \$26,150.70, has made said amount available to the plaintiff in full payment and satisfaction of said judgment. Plaintiff has refused to accept said amount and has taken this appeal from the judgment.

Clarence W. Moseley, Plaintiff and Appellant herein, is sometimes referred to herein as "Clarence" or "Plaintiff"; Lawrence C. Moseley, Defendant and Appellee, is sometimes referred to herein as "Lawrence" or "Defendant";

Defendant and Appellee, Edward S. Franzus, is sometimes referred to herein as "Franzus."

On or about April 1, 1941, Lawrence and Clarence, twin-brothers, purchased certain stock of the Gerson-Stewart Pacific Corporation for the sum of \$4,000.00, one-half thereof being paid by each. On or about May 1, 1943, Lawrence and Clarence purchased additional stock of said Gerson-Stewart Pacific Corporation for the sum of \$4,500.00, one-half thereof being paid by each. The Gerson-Stewart Pacific Corporation was engaged in the business of manufacturing, jobbing and selling soaps and sanitation chemicals, with its principal place of business in Los Angeles, California. On or about September 15, 1943, the said Gerson-Stewart Pacific Corporation was dissolved and its assets distributed to and its business continued by Lawrence and Franzus, as co-partners, under the firm name and style of Sanitek Products Company, with their principal place of business at 111 South Garey Street, Los Angeles, California. Franzus and Lawrence were equal partners in the said Sanitek Products Company, each holding a fifty-percent (50%) share in the business and assets thereof and sharing in the profits and losses thereof equally. One-half of the total consideration by which Lawrence's fifty percent (50%) share was acquired in the said partnership composed of himself and Franzus, had been contributed by Clarence. The other half was contributed by Lawrence. [Tr. pp. 16, 17 and 18.]

On or about August 31, 1945, a written contract [Tr. pp. 16 to 20] was entered into between Clarence and Lawrence at Los Angeles, California, which contract, at the request of the brothers, was prepared by Mr. Curry of the law firm of Williamson, Hoge and Curry, attorneys for Appellant, Clarence, in this case. Under this con-

tract provision was made for a division of earnings between the brothers from the one-half interest held by Lawrence in the Lawrence-Franzus partnership, on a basis of 75% to Lawrence and 25% to Clarence; and the sharing of the capital interest on a fifty-fifty basis; and it was provided, among other things,

“ . . . any such earnings attributable to such share or interest which shall be retained by the partnership shall belong to Lawrence C. Moseley and Clarence W. Moseley in the foregoing ratio, that is, seventy-five percent (75%) to Lawrence C. Moseley and twenty-five percent (25%) to Clarence W. Moseley, and upon any dissolution, liquidation, or other termination of the partnership, the interest of the parties hereto shall be adjusted accordingly,”

and that

“5. Lawrence C. Moseley shall have the sole right to represent said partnership interest and to make all decisions and take all action in respect thereto, and, subject to the obligation to account to Clarence W. Moseley, as aforesaid, shall have all rights and powers with respect to said partnership interest which he would have were said interest his own property, free of these trusts.”

There was no provision in said contract between Clarence and Lawrence with respect to how long it would continue. Thus, Lawrence was given general power to deal with the interest of himself and his brother as though it were his own property, free of any trust obligation, except to

account to Clarence upon liquidation or termination to the extent of one-half of the capital interest, and except to pay to Clarence twenty-five percent (25%) of earnings if any accrued prior to termination.

Lawrence devoted his full time and attention to the business and affairs of the partnership composed of himself and Franzus. Clarence was not a member of the partnership composed of Lawrence and Franzus and contributed no services in its business and did not assume any liabilities thereof. Clarence contributed the sum of \$4,250.00 to Lawrence to be used in the partnership composed of Lawrence and Franzus. Lawrence has previously paid to Clarence on this investment of \$4,250.00, the sum of approximately \$25,000.00; approximately \$20,000.00 being paid prior to the time of the termination, on October 31, 1947, of the contract of August 31, 1945, between Lawrence and Clarence, and \$5,000.00 on November 12, 1947. [Tr. p. 65.]

As of October 31, 1947, the said partnership, Sanitek Products Company, between Lawrence and Franzus, was dissolved by mutual consent of said partners; the business and assets of said partnership, with the exceptions hereinafter noted, were transferred as of said date, October 31, 1947, to Sanitek Products, Inc., a California corporation, one of the defendants originally named in this action but dismissed from the case. In consideration of the transfer, said corporation issued certain shares of its capital stock in equal amounts to the partners, Lawrence and Franzus; said corporation assumed all liabilities of the business ap-

pearing on the books of the partnership at said date; and said corporation continued to carry on the business theretofore carried on by said partnership. [Tr. p. 28.]

Upon the dissolution of said partnership, the real estate, upon which is located the plant and offices of said business, was transferred to the 111 South Garey Corporation, a California corporation, one of the defendants originally named in this action, but dismissed from the case. A lease of said premises was made by 111 South Garey Corporation to Sanitek Products, Inc., and the business continued to be conducted upon and from said premises. Certain cash and the proceeds of accounts receivables, when collected, were distributed in equal shares to Lawrence and Franzus. [Tr. pp. 28-29.]

The defendant, Lawrence, at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting. The amount of the judgment herein granted was at all times unliquidated until the trial of the action. [Tr. pp. 28-30.]

Franzus, formerly a defendant herein, but dismissed from the case, had no knowledge of the existence of the written contract of the brothers, dated August 31, 1945, but knew that the plaintiff, Clarence, had an interest in the one-half share of the defendant, Lawrence. Franzus did not conspire with the defendant, Lawrence, for the purpose of depriving the plaintiff of his interest in the one-half share of the defendant, Lawrence, or preventing the plaintiff from sharing in distributions made to Lawrence from said partnership, or otherwise. [Tr. pp. 30-31.]

Questions Involved and How They Arise.

Appellees' position is that upon the dissolution of the said partnership between Lawrence and Franzus, on October 31, 1947, the contract of August 31, 1945, between Clarence and Lawrence terminated; and that in accordance with said contract the plaintiff has only the right to be paid by Lawrence the value of plaintiff's interest in Lawrence's 50% share in said Sanitek Products Company as of October 31, 1947, as determined by the trial court, to wit, the sum of \$25,400.70, plus the amount owed to Clarence by Lawrence for earnings for the period prior to October 31, 1947, to wit, \$750.00; making a total of \$26,150.70; and that Lawrence had express authority, right and privilege, by the terms of the contract entered into between himself and his brother, dated August 31, 1945, to dissolve the partnership between Lawrence and Franzus at any time and mutually agree with Franzus to a transference of its assets; and that when such dissolution was effected between Lawrence and Franzus on October 31, 1947, it terminated all rights of Clarence under the contract of August 31, 1945, to the further services of his brother, Lawrence, in his behalf; and it terminated all except the right to an accounting of earnings and capital investment and increment up to said date of October 31, 1947; that Clarence's prayer for an accounting from Lawrence for all distributions paid to Lawrence from the assets and earnings of the business for any period of time *after* October 31, 1947, was properly denied by the trial court and that the plaintiff, Clarence, has no right to pur-

sue any funds or properties of the two new corporations, or to require of Lawrence any accounting for any funds or properties received by Lawrence from the corporations after the date of October 31, 1947; that plaintiff, Clarence, is entitled to the balance due on an accounting for his part of such earnings and capital as had accrued up to and including October 31, 1947, and is entitled to no other right. This position was sustained by the trial court. [Tr. pp. 33-34.]

The Plaintiff, Clarence, through his counsel, on page 6 of Appellant's Opening Brief, concedes, and concurs with the trial court's conclusion that when the partnership between Lawrence and Franzus was dissolved, the contract of August 31, 1945, between Clarence and Lawrence likewise terminated. However, Clarence contends, in effect, that notwithstanding the termination of said contract of August 31, 1945, and the dissolution of the partnership between Lawrence and Franzus, that the interest of Clarence provided for in said contract of August 31, 1945, should continue unless and until there is a formal, judicial winding-up of the dissolved partnership between *Lawrence and Franzus*.

ARGUMENT.

I.

Upon the Dissolution of the Lawrence-Franzus Partnership, the Contract of August 31, 1945, Between the Plaintiff, Clarence, and the Defendant, Lawrence, Terminated, and Plaintiff, Clarence, Had Only the Right After an Accounting From Lawrence, to Be Paid the Value of His Interest in the Half Share of Lawrence in the Lawrence-Franzus Partnership, as of October 31, 1947, the Date of Its Dissolution.

At the outset it would be well to consider the rights, duties and obligations of the brothers under their contract of August 31, 1945 [Tr. pp. 16-20], because this, in our opinion will resolve the main question on this appeal.

A careful reading of this contract discloses that Lawrence was given the sole right to deal with the interest of Clarence and Lawrence in the Lawrence-Franzus partnership and to make all decisions and take all action in respect thereto, free of any control whatsoever by Clarence, and was granted all rights and powers with respect to said interest which he would have were the interest his own property free of the contract with Clarence, but subject only to the obligation on the part of Lawrence to account to Clarence. This is a fair and reasonable interpretation of Paragraph 5 of the contract and was adopted by the trial court in the court below. [Tr. pp. 33-34.] Paragraph 5 of said contract is as follows:

“5. It is mutually agreed that Lawrence C. Moseley shall have the sole right to represent said partnership interest and to make all decisions and take all action in respect thereto, and subject to the obliga-

tion to account to Clarence W. Moseley, as aforesaid, shall have all rights and powers with respect to said partnership interest which he would have were said interest his own property free of these trusts.”

The contract of the brothers clearly contemplates the *possibility that the partnership between Lawrence and Franzus might be dissolved, liquidated or terminated* and the contract of the brothers makes provision in the event of that happening. This is a fair and reasonable interpretation of the applicable portion of Paragraph 3 of the contract and was adopted by the trial court in the court below. [Tr. pp. 33-34.] That portion of paragraph 3 of said contract is as follows:

“3. . . . and upon any dissolution, liquidation, or other termination of the partnership the interests of the parties hereto shall be adjusted accordingly.”

Clearly, the provisions of paragraph 5 of the brothers' contract empowered Lawrence to mutually agree with Franzus to a dissolution of the Lawrence-Franzus partnership and the transference of its assets; and the provisions of paragraph 3 of the brothers' contract show that the brothers contemplated the possibility of dissolution of the Lawrence-Franzus partnership and the transference or liquidation of its assets.

In view of the express rights granted Lawrence by this contract we fail to see how it can be seriously urged by the plaintiff that Lawrence was guilty of a breach of trust. The trial court construed and interpreted this contract as empowering and authorizing the action taken by Lawrence and refused to hold him guilty of any breach of trust. [Tr. pp. 28-33.]

The Clarence-Lawrence contract did not prohibit Lawrence from agreeing with his partner, Franzus, to a dissolution of the Lawrence-Franzus partnership; it did not limit Lawrence as to the manner, price or terms under which such a dissolution and transference of assets could take place; instead, it gave Lawrence the right and privilege to treat with the interest of Clarence and Lawrence in the said Lawrence-Franzus partnership in every way as though said interest were the sole property of Lawrence, free of any trust obligation to Clarence, except only the duty of Lawrence to account to Clarence.

The said Clarence-Lawrence contract did not contain any requirement that Lawrence should obtain a judicial winding-up in the event of a dissolution or termination of the Lawrence-Franzus partnership, nor did the Clarence-Lawrence contract require that in event of the dissolution of the Lawrence-Franzus partnership, that the assets of said partnership should be sold at public sale.

The law does not require partners to necessarily obtain a judicial winding-up upon termination of a partnership. They may dissolve and wind up the partnership affairs informally by agreement between themselves, as was done here. (20 Cal. Jur., page 819, section 115; *Cayton v. Walker*, 10 Cal. 450, 455 (1858).) Clarence was not a member of the partnership of Lawrence and Franzus and had no right to control the manner of its dissolution or winding-up. Nor did he make any reservation in his agreement with his brother, Lawrence, that his brother, Lawrence, should insist upon any specific procedure in the event of dissolution or termination of the Lawrence-Franzus partnership. There is no claim in the pleadings that Lawrence at any time attempted to cheat or defraud his brother, Clarence, as to the value of the interest of Law-

rence and Clarence as of the date of October 31, 1947. At all times Lawrence was ready, willing and able to have the value of that interest appraised, determined, and to account therefor to his brother, Clarence, and also to account to his brother Clarence, for the share of the earnings accrued up to and including the said October 31, 1947. As conceded by plaintiff's counsel on page 5 of their Opening Brief, and as to which they raise no question herein, the trial court received evidence, including stipulations of the parties, with respect to the value of Clarence's interest in the one-half share of Lawrence in the Lawrence-Franzus partnership and based upon the evidence before it, judicially determined the value of Clarence's interest as of the date of October 31, 1947, and granted Clarence a judgment predicated thereon. It cannot be urged, therefore, that a mere outsider's idea of the value of Clarence's interest was forced to be accepted by Clarence, but rather the independent judgment of the trial court, upon evidence adduced before it and the stipulations of the respective parties, form the basis for the judgment.

It is respectfully submitted that the contract of the brothers, even if viewed, for the sake of this discussion, as a contract of sub-partnership, would give no rights to Clarence to control the type of dissolution, *i.e.*, formal or informal, of the Lawrence-Franzus partnership, nor the form of the transference of the assets of the Franzus-Lawrence partnership. The contract of the brothers was subordinate and subject to the main partnership agreement existing between Lawrence and Franzus. Clearly, Clarence had no voice or right of control over the main partnership existing between Lawrence and Franzus, nor has Clarence the right to indirectly be heard or considered in the main partnership, through Lawrence. What-

ever Lawrence and his partner, Franzus, mutually decided as to the method of dissolution and winding-up of the Lawrence-Franzus partnership was the sole right of Lawrence and Franzus, in which decision Clarence had no right to participate. Clarence was a mere stranger to the partnership existing between Lawrence and Franzus and at no time was he, nor could he be considered, a partner in that firm.

The case of *Zeisler v. Steinman*, 53 N. Y. Super. 184 (1886), was a case wherein the facts were that the plaintiff had given money to his brother, the defendant, Zeisler, to be used as the latter's own money in the formation of a partnership with one, Steinman, and the money was given for such purpose upon the agreement that in consideration therefor, the plaintiff should have one-half of the profits of his brother. The Court held, at page 185:

"This was an agreement to share in his brother's profits when ascertained and paid over, or at least set apart, by the firm of Steinman and Company. Upon this agreement he can maintain no action against the firm of Steinman and Company, because the firm as such was in no wise a party to it or affected by it." (Citing cases.)

In the case of *O'Conner v. Sherley*, 107 Ky. 70, 52 S. W. 1056 (1899), the Court held that an agreement between a partner and a stranger, to share the former's profits and losses of the original firm, does not make such stranger a partner in the original firm, though such agreement was made with the knowledge of the other partner of the original firm.

Assuming, for the sake of this discussion, that a trust relationship existed between Clarence and Lawrence, the

trust *res* being a 50 percent interest in the Franzus-Lawrence partnership business, when the Franzus-Lawrence partnership was dissolved the trust existing between the brothers terminated and the trustee's (Lawrence) sole remaining duty was to account to his brother, Clarence. In the case of *Knapp v. Knapp*, 15 Cal. 2d 237, 100 P. 2d 759 (1940), it was held:

“But if the respondents were ever trustees for the benefit of the appellant, that relationship terminated when the trust property was sold.”

In the present case, the purported trust agreement specifically contemplates the event, viz.: “dissolution, liquidation and or termination” of the Franzus-Lawrence partnership upon which the trust is to terminate, and defines the trustee's (Lawrence) duty to account in that circumstance.

“The authority of a trustee to transfer trust property depends upon the terms of the instrument by which the trust is created.”

Huntoon v. Southern Trust & Commerce Bank,
107 Cal. App. 121 (1930), 290 Pac. 86, aff'd in
219 Cal. 93 (1933), 25 P. 2d 461.

A trust which provides for the event upon which it is to terminate, terminates automatically when the event occurs.

Exchange Bank v. Scholz, 49 Cal. App. 2d 232, at
236 (1942), 121 P. 2d 526.

Even without specific provision, the plaintiff could not lawfully prevent termination of the Lawrence-Franzus partnership, since plaintiff was not a member of this partnership.

Corporations Code of California, Section 14018(g):

“No person can become a member of a partnership without the consent of all the partners.”

A partnership is terminable at any time by the will of one of the partners.

Corporations Code of California, Sec. 15031(1)(b) and (2).

Corporations Code of California, Section 15025(2)(b):

“A partner’s right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.”

In short, the trust for plaintiff terminated with the termination of the trust *res*, viz., an interest in a partnership: Plaintiff could not lawfully prevent termination or claim wrongdoing because of termination of a partnership in which plaintiff was not a member; and plaintiff specifically recognized that fact by providing in his agreement with his brother for final accounting in the event of “dissolution, termination or other liquidation” of the partnership.

It follows that the transfer of partnership property incident to “dissolution, termination or other liquidation” of the partnership, was not a wrong to plaintiff; nor was the transferee thereof a wrongdoer; nor had plaintiff’s brother any obligation to plaintiff beyond accounting in the manner provided in the agreement.

Huntoon v. Southern Trust & Commerce Bank,
supra, 107 Cal. App. 121, 290 Pac. 86 (1930),
affirmed in 219 Cal. 93 (1933), 25 P. 2d 461.

II.

Plaintiff Was Not Entitled to Interest.

The amount owing to Clarence could not be ascertained until after an accounting was had; the amount therefore was unliquidated, and until ascertained no interest could be assessable against the defendant, Lawrence. A case in point is *Minton v. Mitchell*, 89 Cal. App. 361, at 372, and 373, 265 Pac. 271, at 276 (1928), wherein the Court held that where an accounting is necessary in order to determine the amount due, the demand is unliquidated and no interest may be recovered prior to judgment.

See to the same effect:

Roy v. Roy, 29 Cal. App. 2d 596, 605 (1938), 85 P. 2d 223.

Also:

In re Deming's Guardianship, 192 Wash. 190, at 229, 73 P. 2d 764, 782 (1937).

It will be remembered that the trial court, in the case at bar, expressly found that Lawrence at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting; and that the amount of the judgment herein granted was at all times unliquidated until the trial of the action. [Tr. pp. 28-30.]

In the present case the Plaintiff refused to accept an accounting upon the termination of the contract of the brothers and insisted, and still insists, instead on a con-

tinuing indefinite liability on the part of his brother, Lawrence, for an accounting and for profits from the date of October 31, 1947, forward. Under such circumstances Plaintiff is not entitled to interest, after his refusal of an accounting, since this would enable Plaintiff to benefit by his own improper demands.

“No one can take advantage of his own wrong.”

Civ. Code of California, Sec. 3517.

“He who seeks equity, should first do equity.”

Faxon v. All Persons, 166 Cal. 707, at 720 (1913),
137 Pac. 919.

The persistent refusal of Clarence to accept an accounting shows that it would have been an idle act for Lawrence to have tendered any particular sum of money by way of an accounting and therefore, no interest should run against Lawrence, since the law does not require a person to perform an idle act. (*Civ. Code of California*, Sec. 3532.) As the record shows [Tr. p. 21] Lawrence deposited the sum of \$14,872.36 with the Clerk of the District Court, pursuant to an order of said court made on March 1, 1950, to abide the judgment of said court. This money was available to Clarence at any time he desired to accept the same but Clarence refused at all times to accept this amount, or the amount of the judgment ultimately rendered in his favor; and at the present time still refuses to accept the full amount of the judgment which has been on deposit with the Clerk of the District

Court in Los Angeles ever since the date of said judgment.

Failure to pay a debt that is due is excused when the payment thereof is prevented by the act of the creditor.

Rose v. Hecht, 94 Cal. App. 2d 662, 665 (1949),
211 P. 2d 347.

An offer of payment stops the running of interest on the obligation.

Civ. Code of California, Sec. 1504;

Rose v. Hecht (*supra*), at 665.

Once a tender, or offer of payment has been made, the law provides that such tender, or offer of payment, stops the running of interest on the obligation although there is no subsequent deposit of money to keep the tender good.

Wadleigh v. Phelps, 149 Cal. 627, at 642 (1906),
87 Pac. 93;

Civ. Code of California, Sec. 1504.

III.

Plaintiff Has No Claim Against Franzus or the Corporations and They Were Properly Dismissed by the Court From the Case.

As we have pointed out in this brief, the contract of the brothers contemplates transfer or sale of the Lawrence-Franzus partnership business and clothed Lawrence with unlimited powers to deal with his half-share interest in the Lawrence-Franzus partnership property as his own, free from trust obligations, except the narrow, limited obligation to pay over and account for the amount due Plaintiff, when, as, and if a termination and dissolution of the Lawrence-Franzus partnership should occur.

In view of the above, clearly Franzus and the corporations are not liable to Clarence in any manner whatever. A case in point is *Huntoon v. Southern Trust & Commerce Bank*, 107 Cal. App. 121 (1930), affirmed 219 Cal. 93 (1933). In that case the heirs of decedent trustor sued the trustee Bank and third party purchasers to recover land deeded by the decedent during his lifetime in trust with the power "to sell and convey the property herein described." Plaintiff complained that the trustee sold after the death of the trustor, and after an unreasonable lapse of time. In sustaining judgment upon demurrers granted without leave to amend, the Court stated:

"It is argued that notice of a trust will be imputed to a purchaser when there is a declaration or recital in the trust deed, either asserting the existence of the trust or serving to put a man of common prudence upon inquiry, and that this is constructive notice of everything to which such inquiry would presumably lead. . . . But while the instrument here involved designates the Southern Trust and Commerce Bank as trustee, it expressly gives such trus-

tee power to sell and convey the real property in question. Under such circumstances, the reasons which lie behind the rule referred to, cease to exist. The grantor having expressly clothed the trustee with not only the legal title, but the power to sell and convey, and a vendee being thus notified that the trustee has this power of conveyance, we think the purchaser from such a trustee is not charged with notice as to any other conditions of the trust, and that a deed from such a trustee will convey title in the real property conveyed, free from any claim of the trustor or beneficiaries of the trust. The authority of a trustee to transfer trust property depends upon the terms of the instrument by which the trust is created. Where a trustee is expressly empowered to sell, his deed vests title in the purchaser."

In fact, where a trustee is empowered to sell or transfer, the purchaser will be protected although the sale be made in violation of the trustee's duty to the beneficiary.

Huntoon v. Southern Trust & Commerce Bank
(*supra*), at p. 127;

Thompson v. McKay, 41 Cal. 221, at 231 (1871).

The case for Franzus and the corporations is even stronger where, as here, plaintiff had no interest in the co-partnership of Lawrence and Franzus, that is to say, in the property which was transferred and distributed, but instead was entitled merely to a provisional, percentage interest in the value accrued to one partner upon the "dissolution, liquidation or other termination of the partnership."

The record shows that Franzus had no knowledge of the existence of the contract of the brothers, but in view of the above, it would make no difference if he had such knowledge.

IV.

**The Authorities Relied Upon by Plaintiff Are Not
Applicable to the Facts of This Case.**

We have no quarrel with the principles of law enunciated by the cases and authorities cited by Plaintiff's counsel in their opening brief. Our contention is, however, that they do not apply to the facts of this case. It should be borne in mind that in the case at bar there is a contract between the brothers fixing and settling their rights, duties and obligations. Statements of the law and from texts of general principles of law are not controlling as against the express terms of a valid contract between the parties establishing their rights and duties.

All of the contentions raised by the plaintiff are readily distinguished when it is considered that Clarence was not a member of the Lawrence-Franzus partnership and when it is considered that Clarence, by express provision, gave his brother, Lawrence, the right to treat with the property as his own, free of any trust obligation and free of all obligation except the duty to account in the event of termination or dissolution of the Lawrence-Franzus partnership. The bulk of the cases cited by Plaintiff involve full partnership and trust arrangements without the broad powers of the one party and the narrow rights of the other which are contained in the instant contract.

Plaintiff's counsel assert that there should have been a judicial winding-up of the Lawrence-Franzus partner-

ship. Merely because a partnership may be judicially wound up does not mean that it cannot be informally wound up, as was done in the case at bar. Plaintiff's counsel has cited no authority which demands that there be a judicial winding-up of a partnership. In fact, as is well known, the more commonly used method is the informal method rather than the formal or court method. In any event, the plaintiff in effect obtained the benefits of a judicial winding up when the trial court ordered an accounting and took evidence of the value of the interest of Clarence as of the date of October 31, 1947. It should be noted that Clarence does not complain that the trial court's finding on such value was unreasonable. In fact, he does not question such finding.

It must be apparent that the real objective of Clarence in this case is to perpetuate his former interest in the Lawrence-Franzus partnership for an indefinite period of time and to accomplish a reformation of the contract between Lawrence and Clarence; and to do that which the trial court expressly refused to allow, to wit: to reform the contract so as to have it continue for an indefinite period of time in the future. The contention of plaintiff's counsel that the contract rights of Clarence should continue until there has been a judicial winding up of the Lawrence-Franzus partnership is but another way of stating that the plaintiff desires indefinite continuation of obligation on the part of Lawrence.

Conclusion.

In summary, we respectfully submit that the rights of the parties to this action are to be measured by the terms of the contract of August 31, 1945; that this contract is clear and unambiguous, and that under this contract Lawrence was given the broad right by plaintiff to treat with the interest of plaintiff as though it were the property of Lawrence, free from any trust obligation, except only for the obligation of Lawrence to account to the plaintiff for one-half of the proceeds of the capital interest of Lawrence in the event of liquidation, dissolution or termination of the Lawrence-Franzus partnership, and except that with reference to earnings made prior to such liquidation, dissolution or termination, to pay to plaintiff twenty-five per cent (25%) of the earnings, if any, of that partnership, and to account for said percentage of earnings, if unpaid, after such liquidation, dissolution or termination.

The contract contemplates the possibility of liquidation, dissolution and termination; and since it contains no specific term, such liquidation, dissolution and termination was left to the sole discretion of Lawrence, who, as noted above, was given the broad right to treat with the interest of himself and his brother as though it were Lawrence's sole property.

Under said broad right, Lawrence was empowered to terminate the contract at any time and to convey or transfer the capital interest of himself and his brother, for such price and in such manner, and under such terms and conditions as though it were his own property, subject only to the obligation to account to and pay plaintiff for one-half of the value of the capital interest held by Lawrence in the Lawrence-Franzus partnership, as of

the date of October 31, 1947, and to account to and pay to plaintiff one-fourth ($\frac{1}{4}$) of any earnings that may have been previously accumulated and unpaid, up to the date of October 31, 1947, the date on which the said termination of the said contract occurred, which was the date the partnership between Lawrence and Franzus was dissolved. It is clear that Lawrence was at all times ready, willing and able to account to and pay plaintiff the aforesaid one-half of the value of the said capital interest and one-fourth of the said earnings, but that at all times the plaintiff refused to accept the same and demanded that the obligation of Lawrence continue indefinitely. Moreover, the amount owing to plaintiff could not be ascertained until after an accounting was had; the amount therefore was unliquidated, and until ascertained no interest on said amount could be recovered against Lawrence.

The trial court properly adjudicated all of the rights, duties and obligations of the parties and it is respectfully submitted that its judgment should be affirmed.

Respectfully submitted,

JOSEPH C. SINGER,

Attorney for Appellees.

POLLOCK & POLLOCK, and

EDWARD I. POLLOCK,

By EDWARD I. POLLOCK,

Of Counsel.

No. 12956.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE W. MOSELEY,

Appellant,

vs.

LAWRENCE C. MOSELEY, EDWARD S. FRANZUS, SANITEK
PRODUCTS, INC., a corporation, and 111 SOUTH GAREY
CORPORATION, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

WILLIAMSON, HOGE & CURRY,
417 South Hill Street,
Los Angeles 13, California,

*Attorneys for Plaintiff and Appellant
Clarence W. Moseley.*

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PAUL P. O'BRIEN

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Appellees.

APPELLANT'S REPLY BRIEF.

An examination of the appellee's brief in this matter shows that his only defense is based upon his interpretation of a single paragraph in the contract between the parties. This is paragraph 5 of the agreement dated August 31, 1945, between Lawrence and Clarence Moseley, which is Exhibit A of the complaint. [Tr. pp. 16-20.] The paragraph in question reads as follows:

"5. It is mutually agreed that Lawrence C. Moseley shall have the sole right to represent said partnership interest and to make all decisions and take all action in respect thereto, and, subject to the obligation to account to Clarence W. Moseley, as aforesaid, shall have all rights and powers with respect to said partnership interest which he would have were said interest his own property free of these trusts."

On the basis of this paragraph the appellee would have the court read into the agreement an authorization to the trustee to sell the trust property to himself at a value to be fixed by a court, and without interest on the purchase price until such time as the valuation is so fixed.

Provisions similar to paragraph 5 are found in practically all formal trust agreements, and we think the court might take judicial notice of this fact, and of the further fact that the purpose is to give the trustee broad powers in conducting whatever the business of the trust may be, and that there is no intention, by any such clause, to relieve the trustee of any fiduciary obligations which the law or the agreement otherwise impose upon him.

We venture to say that it would be difficult to find a will creating a trust or a formal *inter vivos* trust instrument written in recent years which does not contain a similar clause. The following is an example from a form book circulated among attorneys by Security-First National Bank of Los Angeles:

“The enumeration of certain powers of the Trustee shall not limit its general powers, the Trustee, subject always to the discharge of its fiduciary obligations, being vested with and having all the rights, powers and privileges which an absolute owner of the same property would have.” (Page 19 of Fifth Edition, 1948.)

Any suggestion that the intention of paragraph 5 was to free the trustee in our case from his normal fiduciary obligations is met by the language of the paragraph itself. The powers are granted “. . . subject to the obligation to account to Clarence W. Moseley, as aforesaid, . . .” An explanation of what “. . . account . . . as aforesaid”

means will be found by reference to paragraph 4, wherein Lawrence agrees “. . . to faithfully account to Clarence W. Moseley for the latter's share of the partnership share or interest so represented by him, together with all profits accruing thereto.” The language of the Security Bank form, “. . . subject always to the discharge of its fiduciary obligations, . . .” might have been preferable, but we submit that they mean the same thing. The obligation of a trustee to account to his beneficiary is an obligation to perform the duties which the law or the agreement impose upon him. There is nothing in the agreement to suggest any different meaning. The contention that the grant of broad powers, subject only to the duty to account, was intended to imply that the trustee was to be free of the usual restrictions implied by law which prevent the trustee from dealing with the property for his own purposes, would seem so extreme that it hardly merits a reply. Yet that is the appellee's entire case.

There are certain specific provisions, as the appellee points out, in regard to dissolution. The implication of these, however, is clearly contrary to appellee's position that the only duty of the trustee was to pay to the beneficiary the money value of the trust assets as determined by him or by the court. Paragraph 2 of the agreement specifies the percentage of capital assets owned by each of the parties, and provides that “upon any distribution thereof by the partnership, Lawrence C. Moseley shall *forthwith pay or deliver* to Clarence W. Moseley fifty per cent of all *moneys and properties* distributed to him in respect of such interest.” (Emphasis added.) Paragraph 3 specifies the percentage in ordinary earnings owned by each of the parties, and provides that “. . . upon any dis-

tribution thereof, Lawrence C. Moseley shall forthwith *pay or deliver* to Clarence W. Moseley twenty-five per cent of all such earnings distributed to him in respect of such share or interest." These provisions not only do not limit the accounting duties of the trustee to an obligation to pay money, but clearly negative any such idea.

The only other reference to dissolution is the provision at the end of paragraph 3, which specifies that undistributed earnings shall belong to the parties in a certain ratio, and that ". . . upon any distribution, liquidation, or other termination of the partnership, the interests of the parties hereto shall be adjusted accordingly." This relates to, and is made necessary by, the provisions of the contract to the effect that Clarence's share in the capital was fifty-fifty with Lawrence, but the sharing of the earnings was 75% to Lawrence and 25% to Clarence.

The two brothers jointly had a 50% interest in the main partnership between Lawrence and Franzus. Therefore, in the net worth of the main partnership, Clarence and Lawrence each had 25% of the capital, but Lawrence had 37½% of undistributed earnings accrued after January 1, 1945, the effective date of the agreement, and Clarence had only 12½%.

Upon any distribution of money remaining after payment of debts of the partnership and expenses of winding-up, reference would have to be made to the books to see what the capital was, and this, as far as the brothers were concerned, would be the net worth of the business on January 1, 1945, when the agreement commenced. Of this amount Lawrence would get 25%, Clarence 25%, and Franzus 50%. Any sums remaining over and above this figure would represent earnings accrued after January 1,

1945, and not theretofore distributed to the partners. Such earnings would go 50% to Franzus, 37½% to Lawrence, and 12½% to Clarence. Since only ordinary earnings were to be divided in the last mentioned proportions, if any part of the surplus represented capital gains, that would go in the same ratio as the capital above mentioned.

These provisions for adjustment on liquidation might indicate that payment would be made in money, although conceivably it would be possible to identify certain specific properties as capital assets, and if they were of a fungible or uniform nature, they could be distributed in kind. However, if the distribution is to be made in money, there is nothing to suggest that the money is not to be the result of the sale of assets in the traditional manner for the winding-up of partnerships, to which all the partners are entitled, in the absence of agreement to the contrary. Yet the appellee asserts that it authorizes the trustee to take the assets for his own use, subject only to the obligation to pay to the beneficiary their value at the date of taking, without interest! Surely a right so contrary to the fundamental rules governing fiduciaries should not be read into a contract, unless expressly stated. It should be noted in this connection that no evidence was taken by the court below in explanation of the contract, so that this court is in the same position as the trial court was in interpreting the document. [Tr. p. 48.]

There is no dispute about the facts in the case, as comparison of the statements in the two briefs will show, other than the assertion by the appellee that he was at all times willing to fully account to the plaintiff, and to pay to plaintiff any sums found due on said accounting. (Appellee's Br. p. 6.) As shown in our opening brief, at

page 23, and as clearly appears from the appellee's brief, this is simply a question of the meaning of terms. Lawrence has never been willing to do anything more than to account for earnings up to October 31, 1947, and to pay to Clarence the value of his share in the business as of that date, first as determined by Lawrence, and later as determined by the court. . He has never been willing to account as we understand the meaning of the term. He didn't even tell his brother what had happened until twelve days after he and Franzus had taken over the assets. [Letter of November 12, 1947; Tr. p. 65.]

Counsel for the appellee states, at page 21 of the appellee's brief:

"We have no quarrel with the principles of law enunciated by the cases and authorities cited by Plaintiff's counsel in their opening brief."

Being in agreement on the facts and the law, they are driven to the position, and boldly take it, that the terms of the contract authorized the trustee to take over the property which was the subject of the trust, and use it for his own purposes. On the same page they say:

". . . Clarence, by express provision, gave his brother Lawrence the right to treat with the property as his own, free of any trust obligation, and free of all obligation, except the duty to account, in the event of termination or dissolution of the Lawrence-Franzus partnership."

They consider the duty to account to be of no importance, or at least that all it means is that the trustee can buy

out his beneficiary any time the trustee pleases. Again, at page 19, in the first paragraph, they speak of:

“ . . . the narrow, limited obligation to pay over and account for the amount due Plaintiff, when, as, and if a termination and dissolution of the Lawrence-Franzus partnership should occur.”

The argument takes another form on page 11 of appellee's brief, by pointing out things that the contract did not prohibit or contain. Obviously we are not concerned with this. The contract imposed the duties of a trustee upon Lawrence, as did his position of being a partner in possession of partnership assets, and he cannot escape the legal obligations which arise from this position unless the contract expressly or by inescapable implication relieves him thereof.

In regard to the assertion on page 11 that the law does not require partners to necessarily obtain a judicial winding-up, but that it may be done by agreement between themselves, this is, of course, true, and it is the normal way to do it. We further agree that Clarence had no right to prevent the dissolution of the Lawrence-Franzus partnership. When that happened, however, Lawrence was under certain duties to Clarence, which he cannot escape unless the contract permits him to do so, and we are willing to stand or fall upon the proposition that it does not. The argument of counsel for the appellee overlooks the fact that Lawrence was not only a partner of Franzus, but he was also a partner of and trustee for his brother Clarence. Whatever rights he had in relation to Franzus were limited by his duties to Clarence. He was not in a position to make any agreement with Franzus for the disposition of the assets unless Clarence joined in the agreement.

Not only was the freedom of Lawrence to deal with his partner Franzus limited by Lawrence's obligation to his other partner, Clarence, but Clarence, as a sub-partner, had a direct right to an accounting running against both Lawrence and Franzus as members of the main partnership when that partnership was dissolved. The cases cited on page 13 of appellee's brief do not deal with that situation. We concede the law to be that a sub-partner is not a partner in the main partnership, and has no rights in respect of the main partnership until dissolution occurs, or other circumstances arise which give a right of accounting to the member who is also a member of the sub-partnership. Then, as shown by the cases cited in our opening brief, at page 18, the law takes a short cut, and allows the sub-partner to come in and claim his share of the assets of the main partnership. There is nothing inconsistent between these cases and the cases cited by appellee.

In *Zeisler v. Steinman*, 53 N. Y. Super. 184, the plaintiff brought an action against his brother, the defendant Zeisler, for dissolution of an "alleged co-partnership between them" of which the defendant Steinman was not a member, and "to that end" plaintiff demanded that "the defendants be enjoined from carrying on the business of the co-partnership existing between them under the firm name of C. B. Steinman & Co." This the court refused to do. It did not appear that the Steinman partnership had been dissolved, or that any other circumstances existed which gave the other defendant, the plaintiff's brother, a present right to an accounting or winding-up of that firm.

O'Connor v. Sherley, 107 Ky. 70, 52 S. W. 1056, merely holds that a sub-partner is not a member of the

main firm, and therefore is not liable to creditors of the main firm upon its debts.

In any event, while they represent an interesting bit of little-used law, the cases on sub-partnership are not necessary for the appellant's position. Whatever the relationship, or lack of it, might have been between Clarence and Franzus before dissolution, when the main partnership was dissolved, unless we are wrong about what the agreement means, Lawrence had a duty to account to his brother Clarence, and it was a violation of this duty for him to join with Franzus in taking over the assets for their own purposes. Franzus and the other defendants are chargeable with knowledge of the plaintiff's rights, and they took the property subject to all of those rights. As said by the Supreme Judicial Court of Massachusetts in *Lovejoy v. Bailey*, 214 Mass. 134, 101 N. E. 63 at page 70 (cited in our opening brief at p. 18), "Bailey stood in a fiduciary relation both to Fowle and to Lovejoy. The other defendants, taking the property which was the subject of that fiduciary relation from Bailey, with notice of the rights of Fowle and of Lovejoy, gained no greater rights than those of their grantor."

Regardless of what the rights of a sub-partner may be in general, it was the duty of the defendant Lawrence to exercise whatever rights he had against defendant Franzus, in order to render a proper accounting to plaintiff Clarence. There can be no doubt that upon the dissolution of the main partnership, Lawrence had the right to cause it to be wound-up by a judicial proceeding, and Franzus would have no right to complain. Clarence, in the absence of an agreement between the three interested parties, had the right to insist that Lawrence exercise this right. No transfer of the assets to the defendant

corporations, or anyone, taking with knowledge of Clarence's rights, could cut them off.

The other cases and authorities cited by the appellee on the main point merely exemplify or state obvious principles of law, which have no bearing here.

The cases cited on page 16 to the effect that where an amount owed cannot be determined without an accounting, interest will not be allowed until the sum is liquidated by the accounting, also are not applicable here. We come back again to the interpretation of the contract. If, upon a dissolution of the main partnership, and consequent dissolution of the sub-partnership and termination of the trust agreement, the appellant was entitled only to have the value of his share of the business determined and the amount paid over to him, there might be merit in this contention, although even as to this the appellee errs when he says that he was at all times willing to give to plaintiff such an accounting, and that plaintiff refused to accept it. Upon the dissolution of the main partnership, the only offer which Lawrence made to account was that set forth in his letter of November 12, 1947. [Pltf. Ex. 2, Tr. p. 65.] In that letter he offered, as one alternative, to pay \$20,000.00 to buy Clarence out. This was not a definite offer. There was simply an admission that Clarence's share should be worth that much. Afterwards Lawrence came down on his figure, and paid \$14,872.36 into court. [Tr. p. 21.] After judgment he increased the deposit to the amount of the judgment. [Tr. p. 37.] If this is what is meant by accounting, it is true that the plaintiff, the appellant here, has refused to accept it, and still refuses to do so.

If we are correct in our contention that the duty to account imposed upon the appellee by the agreement of

August 31, 1945, is simply the duty to discharge the obligations of a fiduciary to the appellant, as determined by the law of partnership and the law of trusts, and if it follows, as we maintain, that the appellee had no right to take over the assets for his own purposes by agreement with Franzus or anybody else, and that this, in effect, amounted to a conversion of the property, or rather of the appellant's share therein, then one of the remedies of the appellant is to be paid the value of the property at the date of conversion, with interest at the legal rate on such value. This is an alternative remedy which the law gives in a case of conversion of property, whether by a trustee or anybody else, and the fact that the value has to be determined is immaterial. As stated in 8 Cal. Jur. 791:

“The fact that proof of the market value of goods is required to establish the amount of a claim does not render it incapable of being made certain by calculation, so as to prevent the allowance of interest under Section 3287 of the Civil Code.”

The section referred to reads as follows:

“Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.”

Again we wish to point out that the remedy of recovering the value of his share at the date of conversion is not one which the appellant has elected, but if he is re-

quired to take it, it would seem clear that he is at least entitled to interest on such value.

It is conceded that on \$750.00 of the judgment interest should not be allowed, since that represented merely a striking of a balance between the brothers upon an accounting of earnings for the period prior to October 31, 1947.

In support of his contention that plaintiff had no rights against Franzus or the corporations, and that they were properly dismissed, the appellee, at pages 19 and 20 of his brief, cites cases to the effect that where a trustee has an express power of sale, the purchaser is not bound to see to it that the trustee properly applies the proceeds, or otherwise carries out the terms of the trust. We have no quarrel with these cases, but they have no application here for two reasons: There is no express power of sale in the trust instrument we are considering, and, even if there were, it would surely not authorize the trustee to sell to himself, or to himself and another associated with him.

In their brief, counsel say at page 16 that the appellant insists on a continuing indefinite liability on the part of his brother Lawrence, and again, on page 22, they say it must be apparent that the real objective of Clarence is to perpetuate his former interest in the Lawrence-Franzus partnership for an indefinite period of time, and to accomplish a reformation of the contract. It is true that at the trial we did suggest that the incorporation of the business was merely a transparent scheme by which Lawrence sought to get rid of Clarence's interest [Tr. p. 54], that the substance of the situation had not been changed [Tr. p. 78], and that the court should require Lawrence

to perform the contract in the same manner as he would have done had the partnership remained, at least until a proper winding up is had, and we still maintain that.

We further argued that if the contract gave Lawrence the power to incorporate the business, Clarence at the very least should be entitled to have the stock substituted for the partnership interest as the trust *res*, and that the agreement should otherwise be carried out as if the partnership still existed. It seems clear, however, that Lawrence had no authority under the agreement to incorporate the business. The very clause of the contract upon which his entire claim of power is based [Par. 5, Tr. p. 19], gives him only "the sole right to represent said partnership interest," and this is followed by the grant of powers we have discussed, which therefore relate only to a *partnership* interest.

We further concluded that the trial court was correct in holding that Lawrence had a right to terminate the main partnership, because there was nothing in the contract that prevented him from doing so, and the contract provided no fixed term for its continuance. The case, it seems to us, inescapably comes down to the issue of what the duties of Lawrence were *when this event occurred*. Counsel for Lawrence apparently take the same view, and we also appear to be in agreement that the case must be decided on the narrow ground of whether or not the contract authorized Lawrence to take over the assets for the use of himself and Franzus, at a valuation for Clarence's share to be fixed by the court, without interest on such value until so fixed.

If we are right that there is no provision of the contract, express or implied, remotely suggesting any such variation from elemental trust law, then there has been

a breach of trust by Lawrence, and if Clarence should elect a remedy which may result in delaying Lawrence's desire to get rid of him and to cut off his share of the profits, Lawrence has only himself to blame. He and Franzus could have had the business put up for sale in 1947, and they can still do so. Clarence insists only upon the right to put his own valuation on the business by bidding at such a sale, and to receive his share of the earnings until such a sale is had, or until an agreement is reached by all who have the right to agree.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY,

By FULTON W. HOGE,

*Attorneys for Plaintiff and Appellant
Clarence W. Moseley.*

No. 12961

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ADAMANT COMPANY, WALTER B. SCHOVILLE, JOE SEEPLE, HARRY
WYNN, HERSCHEL BULLEN, MART N. BULLEN, J. C. HAYWARD
AND MART S. HAYWARD; RECONSTRUCTION FINANCE CORPORA-
TION, AS ASSIGNEE OF TREASURY COMPANY, APPELLEES

UNITED STATES OF AMERICA, FOR THE USE OF RECONSTRUCTION
FINANCE CORPORATION, A FEDERAL CORPORATION, ACTING IN
BEHALF OF DEFENSE PLANT CORPORATION, A FEDERAL CORPORA-
TION, APPELLANT

v.

ADAMANT COMPANY, WALTER B. SCHOVILLE, JOE SEEPLE, HARRY
WYNN, HERSCHEL BULLEN, MART N. BULLEN, J. C. HAYWARD
AND MART S. HAYWARD, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES, APPELLANT

WM. AMORY UNDERHILL,

Assistant Attorney General.

ERNEST A. TOBIN,

United States Attorney,

Los Angeles, California.

AUGUST WEYMANN,

Special Attorney, Department of Justice,

Los Angeles, California.

ROGER P. MARQUIS,

FRED W. SMITH,

Attorneys, Department of Justice,

Washington, D. C.

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(I)

In the United States Court of Appeals for the Ninth Circuit

No. 12961

UNITED STATES OF AMERICA, APPELLANT

v.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE,
HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD AND MARY S. HAYWARD; RECON-
STRUCTION FINANCE CORPORATION, AS ASSIGNEE OF
TREASURE COMPANY, APPELLEES

UNITED STATES OF AMERICA, FOR THE USE OF RECON-
STRUCTION FINANCE CORPORATION, A FEDERAL COR-
PORATION, ACTING IN BEHALF OF DEFENSE PLANT
CORPORATION, A FEDERAL CORPORATION, APPELLANT

v.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE,
HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD AND MARY S. HAYWARD, APPELLEES

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

BRIEF FOR THE UNITED STATES, APPELLANT

JURISDICTION

This is a suit by the United States to condemn land
in Los Angeles, California, under authority of section

5d (5) of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 5, as added by the Act of March 27, 1942, c. 198, 56 Stat. 174, 15 U. S. C. sec. 606b (5), and Title II of the Second War Powers Act of March 27, 1942, c. 199, sec. 201, 56 Stat. 176, 177, 50 U. S. C. App. sec. 632, as extended by Executive Order 9217, August 7, 1942, 7 F. R. 6177, 50 U. S. C. App. following sec. 632. The district court had jurisdiction under Title II of the Second War Powers Act, *supra*, and section 1 of the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257. The judgment appealed from was entered on October 30, 1950 (R. 154-156). A motion by the United States to vacate and set aside findings and judgment was denied on December 11, 1950 (R. 183-184).¹ A notice of appeal was filed by the United States on January 2, 1951 (R. 185-186). A notice of appeal was also filed by the United States on January 5, 1951, for the use of Reconstruction Finance Corporation (R. 187). This Court has jurisdiction of the appeal under 28 U. S. C. section 1291.

QUESTION PRESENTED

Where a lessee acquires oil and gas leases on two contiguous tracts to make a minimum drill site of one acre, where under local law only one well could be and was drilled on such combined site, where both sides offered testimony only as to the value of the "total working interests" in the well, and where such testimony reflected the value of the lessee's interest in

¹ Similar motions filed by the other parties in this case were likewise denied on that date (R. 183-184).

the total estimated future production of the well at the time of taking by the Government, does an award for such value in a condemnation proceeding compensate the lessee for its interest in both leases?

STATEMENT

This is a condemnation proceeding instituted on September 28, 1942, by the United States, for the use of Reconstruction Finance Corporation, acting in behalf of its subsidiary Defense Plant Corporation² to condemn real property in the City of Los Angeles, California. The property, consisting of a largely depleted oil field known as the Playa del Rey Field, was taken for use as a natural gas reservoir.³ While many different parcels were within the area condemned, this appeal involves two contiguous tracts on which Treasure Company owned oil and gas leases. Those leases are known as the Fletcher lease and Burns No. 1 lease. The former consists of lots 9, 10 and 11, Block 33, Tract 9809, while the Burns No. 1 lease consists of lots 7, 8, 35 and 36 in Block 33, Tract 9809 (Fdg. I, R. 135).⁴ The areas covered by these leases are identified in color on Plaintiff's Exhibit 1, Original, the Fletcher lease being colored in solid orange, while the Burns No. 1 lease is cross-hatched in brown. An

² This corporation was merged with the Reconstruction Finance Corporation by the Act of June 30, 1945, 59 Stat. 310.

³ Other cases arising out of this proceeding were before this Court in *United States v. Block*, 160 F. 2d 604 (1947) and *Treasure Company v. United States*, 169 F. 2d 437 (1948).

⁴ The lots constituting the Fletcher lease were described in the complaint as Parcel No. 251, while the lots in the Burns No. 1 lease are described in the complaint under Parcels 247, 249 and 250 (R. 8-9).

oil well identified as Treasure Well No. 8 was drilled on lot 9 of the Fletcher lease (Fdg. II, R. 136).

In its answer defendant Treasure Company alleged its ownership of the Fletcher lease and the Burns No. 1 lease (paragraphs V and VI, R. 44, 46). It also alleged ownership of two other oil and gas leases known as Burns No. 2 and Burns No. 3 leases, and alleged a value for its Fletcher lease as of September 28, 1942, of \$1,000,000.00 and a like value for the three Burns leases combined (paragraphs VII, VIII, X and XI, R. 47, 48, 49).⁵

Defendant Adamant Company alleged ownership, through an agreement with Treasure Company, of a 25% participating interest in the Burns No. 1 and Fletcher leases and in Treasure Well No. 8 and that "Treasure Well is located upon the drill-site composed of the two above [Fletcher and Burns No. 1] leaseholds," (Ans., paragraphs IV and V, R. 15-16). It was further alleged that Adamant Company had drilling rights also in Burns No. 2 and Burns No. 3 leases, and alleged a value for all of such interests of \$300,000.00 (Ans., paragraphs VI and VIII, R. 17-18).

Similarly defendant Scoville alleged an interest of 17% in the Fletcher and Burns No. 1 leaseholds, under the same agreement with Treasure Company, and valued his interest at \$204,000 (Ans., paragraphs I, III, R. 20-21). Defendant Wynn likewise alleged ownership of a 5% interest in the Fletcher and Burns No. 1 leases and in Treasure Well No. 8, having a

⁵ As will hereinafter appear, the Burns No. 2 and Burns No. 3 leases are not involved on this appeal.

value of \$60,000.00 (Ans., paragraphs II and III, R. 22). Defendants Herschel Bullen and Mary H. Bullen alleged ownership of a 1% interest in oil production from the Fletcher lease, as did defendants J. C. Hayward and Marion S. Hayward, and asked the court to determine the value of such interest (Ans., R. 53-55). Defendant C. F. Johnson claimed a 2½% interest in the Fletcher and Burns No. 1 leases here involved as well as in Burns leases 2 and 3 not here involved and that all those interests had a value of \$50,000.00 on the date of the taking (Ans., R. 31-35).⁶

Trial proceedings were had before Judge Beaumont and a jury, beginning on April 19, 1949, as to the value of the Fletcher and Burns No. 1 leases among other parcels (Fdg. VI, R. 137; R. 210-1187). During the course of the trial the Government settled with the landowners or lessors under those two leases (Fdg. VII, R. 138, 1165). Hence the only interest in those leases before the jury at the valuation trial was the lessee's interest.

At the valuation trial neither the Government nor any of the defendants⁷ offered any testimony as to a value for the lessee's interest in either the Fletcher or Burns No. 1 lease separately. The testimony offered by all parties was as to the value of the lessee

⁶ Johnson's claim was settled during the trial (R. 437-438).

⁷ At the time the trial began, the Government was negotiating for settlement of Treasure Company's claim. Treasure Company assigned its interest to the Reconstruction Finance Corporation (Fdg. XXIII, R. 145) and that defendant did not participate in the valuation trial.

interest in Treasure Well No. 8.⁸ Similarly, the form of verdict approved by all parties and placed before the jury did not include as items the lessee interest in either of the two leases, but did include as an item the following: "H-I W. I. Being the total working interest in Treasure Company Well No. 8" (R. 65). And the sole question on this appeal is whether an award for that item covers the lessee interest in both of those leases or only the lessee interest in the Fletcher lease on which the well was drilled.

The testimonial record of the valuation trial is lengthy, but may be summarized as follows. The Government's first expert witness was Mr. John F. Dodge, during whose appearance on the stand the symbol H-I W. I., or working interest, was developed and its meaning fixed. This witness used what was described as the decline curve method of estimating future production of the well, the rate of recovery and the future operating costs (R. 241, 340).⁹

Proper understanding of the testimony of this witness as to the working interests in Treasure Well No. 8 requires notice of the pattern followed by him in testifying previously as to other parcels. He explained that a community lease is one where a number

⁸ The various defendants of course had claims to percentages of such value under alleged contracts with the lessee, Treasure Company. But the distribution of the award, as between these claimants, was not placed before the jury (R. 1073). Distribution was later ordered by Judge Westover in proceedings which gave rise to this appeal (R. 154).

⁹ The technical details of the process by which this witness or any other witness arrived at his opinion of value is not of great importance now.

of individual lot owners get together and join in a lease to a single oil and gas lessee and that the lessee in turn may sublet a portion of the land to various oil companies, or all of the land to one such operator; that such subleases under a community lease were marked on Plaintiff's Exhibit 1, Original, by cross-hatching in color (R. 228-229). He further explained that the royalty payable to the landowners under a community lease was commonly $16\frac{2}{3}\%$ (R. 231). He then explained that the lessee under the community lease, when he subleased to another would ordinarily reserve a total royalty greater than that which he must pay the landowners, and that the difference between the two was called an overriding royalty. He then proceeded to value various community leases on the basis of landowners' royalty and overriding royalty (R. 232-233). A uniform pattern was adopted of giving to the landowners' royalty under a community lease a designation by letter as, for example, "Parcel A" which was Herndon Community Lease No. 1 (R. 251). The overriding royalties under subleases under that community lease were given the designations A-1 (R. 257), A-2 (R. 259) and A-3 (R. 261). That procedure was adhered to also in valuing the other community leases which were involved.

Burns acquired his interest in the lots here involved under a sublease from the holder of the Herndon Lease West of Falmouth Avenue (R. 283, 286, 718, Adams, Scoville and Wynn Ex. G, Original). Herndon Lease West of Falmouth Avenue was desig-

nated as "Parcel G" (R. 283). The witness Dodge gave for Parcel G, the landowners' royalty, a value of \$40,340.00 and proceeded to value the overriding royalties on two subleases given designations G-1 and G-2 (R. 284-285). The sublease from Herndon to Burns was called "G-3" and the witness explained that these four lots were joined to the Fletcher lease to comprise a one-acre drill site. In response to a question by the Court the witness testified that the seven lots (three in the Fletcher lease and four in the Burns lease) comprise "the necessary legal one-acre in order that a well be drilled" (R. 286). The witness went on to testify that since the Burns lease called for only a 12.03% royalty, there was no overriding royalty and that the 12.03% had been included in the figure he had previously given, \$40,340, as Parcel G, the landowners' royalty for the whole of Herndon Lease West of Falmouth Avenue, and thereupon G-3 was eliminated as a separate parcel. "In this instance, by a special arrangement, specially executed lease, these lots were joined to the parcel known as the Fletcher Lease and called for a 12.03% royalty. So it accrues to the lot owners in Parcel G" (R. 286-287).

The Fletcher lease was given the symbol H (R. 287). The witness testified that Treasure Well No. 8 was drilled on the Fletcher lease, but that it was also subject to the royalty interest of 12.03% royalty on the Burns lease which he had previously described as payable to the lot owners in Herndon Community Lease West of Falmouth. He was then asked what was his opinion of the value of the "working interest"

in Treasure Well No. 8, and the witness stated (R. 306): "The total working interest in the Treasure No. 8 well under conditions of total royalty as disclosed by the title search is \$150,830. That title search discloses the well as subject to a total of $28\frac{7}{10}$ ths per cent royalty and the value which I have given for the total working interest is predicated upon that royalty being paid." The $28\frac{7}{10}$ per cent royalty was broken down by the witness as "being $16\frac{6}{7}$ per cent to the Fletcher lease and 12.03 per cent to the Herndon Community west of Falmouth" (R. 307).¹⁰ The 12.03%, as already detailed, was the royalty payable on the Burns lease. The witness then stated that "I have placed upon the map [Plaintiff's Exhibit 1, Original] the symbol H-I Working Interest, to designate the value which I have given as the working interest in the Well Treasure 8 located on Parcel H" (R. 307). It was later established that the symbol H-I W. I. was used to designate the total working interest, and the symbol H-I was adopted to designate the total or combined landowners' royalty (R. 399, 400). Working interest included all interests in the well "excluding only the two landholders' royalties, the one to Fletcher and the one to the Herndon Community Lease West of Falmouth" [the Burns lease]. "It

¹⁰ As hereinafter detailed, the parties subsequently agreed that the royalty actually called for by the Fletcher lease was 7.365%, and that the combined royalties (7.365% to Fletcher and 12.03% to Burns) were 19.395% which they agreed to shorten to 19.4%. They so stipulated (R. 746) and as a result the expert witnesses of both the Government and the defendants were recalled to testify on that basis.

[the well] was drilled on the Fletcher, but pays a royalty not only to the Fletcher but to the adjoining lots [the Burns lease] which I have previously described, that 12.03 per cent royalty going to the lot owners in Parcel G" (R. 307-308). In response to a question by defendant Johnson, claimant of an interest,¹¹ the witness testified "I have stated, Mr. Johnson, that was after the landowners' royalties, the 12.03 and the 16.67 per cent were taken out. In other words, it is the profits to the operators of the well" (R. 309). Likewise he testified that the working interest "amounts to the difference between 100 per cent and $28\frac{7}{10}$ per cent, or 71.3 per cent of *the production*" (italics supplied (R. 309-310)). Similarly, on cross-examination he testified that his figure of \$150,830 represented the value of all the working interests, and is based upon a 17-year life, a total future recovery of 344,800 barrels of oil, and the accompanying gas and gasoline, and that it represented 71.3 per cent of the oil. At this point the witness gave a value of \$71,440 for the 28.7 per cent combined landowners' royalty (R. 333).¹²

The Government's other expert witness was Mr. Harry P. Stolz. He testified that past production performance of an oil well can be projected into the future and the future production thus estimated

¹¹ Johnson's claim was later settled by the plaintiff during the trial (R. 437-438).

¹² The witness explained that the production expenses came out of the working interest (R. 333-334). This explains why the figure of \$150,830.00 for the working interest does not bear the exact ratio to the \$71,440.00 for the landowners' royalty as 71.3 to 28.7.

(R. 385). His primary factor was the past production performance of the well (R. 388). This is the decline curve method used by the witness Dodge. He used the same basic data as had Dodge, but arrived at his valuations independently (R. 391). Stolz, however, arrived at generally lower values for the various landowners' royalties, and for overriding royalties under subleases than did the witness Dodge. This was likewise true when it came to evaluating the H-I W. I. working interest in Treasure Well No. 8. He testified that Treasure Well No. 8, marked H-I W. I. on Plaintiff's Exhibit 1, Original, had a working interest of 17.30 per cent [*sic*, obviously an inadvertent error of either the witness or the reporter, and intended to be 71.30, 100% less the combined landowners' royalty of 28.7%] and that he valued such working interest at \$97,029 (R. 397). He valued the combined landowners' royalty of 28.7% at \$57,838 (R. 401).¹³

The valuation testimony introduced by the defendants initially differed from that of the Government in that it was addressed to the total mineral value of the well Treasure No. 8. Defendant Seepie, who claimed a 17% interest under an agreement with Treasure Company (R. 483), testified that Treasure Well No. 8 had a market value of one million to two million dollars (R. 465).

¹³ At this point it was discovered that no symbol had been adopted to designate the combined landowners' royalty, and H-I was used to distinguish this combined royalty from H-I W. I., the total working interest (R. 399-400). As hereinbefore noted (p. 5, *supra*), the *value* of the combined landowners' royalty was settled as between the landowners and the Government.

Defendant's chief expert witness was Dr. Robin Willis. The witness testified that he had been called to evaluate Treasure Well No. 8 "as a producing well in terms of dollars and cents" (R. 537). He further testified that there are two methods of estimating the oil that can be produced in the future, one the decline curve method based on past production (which was the approach of the Government expert witnesses), and the other method based upon estimating the area from which the well will produce oil, the sand thickness and other factors (R. 538-539). The witness considered the decline curve method was unreliable as to Treasure Well No. 8 (R. 540) and preferred the other method, which he labeled the volumetric basis (R. 545). On the latter basis he estimated that the recoverable oil amounted to 1,964,400 barrels (R. 555) and on his assumption that no additional wells could be drilled within that portion of his drainage area of 32.2 acres which lay west of Delgany Avenue, which was about half of his estimated drainage area (R. 588-592), he testified that "the total mineral interests, including landowners' and working interests", had a value of \$1,251,000.00 (R. 606). Assuming that three additional wells might be drilled by other parties west of Delgany Avenue, he testified that the valuation of \$1,251,000.00 for the total mineral interest would be reduced 30% and gave a valuation on this basis of \$875,000.00 (R. 607). Both the \$1,251,000.00 and the \$875,000.00 figures were based on the volumetric method of estimating future production (R. 608). Apparently unwilling to gamble alone on this method, the defendants proceeded to have the witness testify

on the basis of two decline curves, the method which had been used by the Government witnesses (R. 608). On the basis of a decline curve which the witness had prepared (designated on Adamant, Scoville and Wynn Exhibit Q as "Willis-B"), the witness valued "the total market value of the leasehold as of September 28, 1942" at \$713,300.00 (R. 611). The witness later conceded he had miscalculated and reduced his valuation on the basis of decline curve Willis-B to \$566,400.00 (R. 626). He testified on the basis of still another decline curve identified on said Exhibit Q as "Willis-D", to a valuation of \$322,000.00 "for the total leasehold." (R. 612) Here again this witness later conceded error and reduced the valuation on the basis of Willis-D decline curve to \$260,000.00 (R. 670). To recapitulate, this witness testified that the total value of the well, including both landowners' royalties and working interests, on the volumetric basis, was \$1,251,000.00 assuming forbidden drilling west of Delgany Avenue, \$875,000.00 if it be assumed three wells could be drilled in that area, \$566,400.00 on the basis of Willis-B decline curve, and \$260,000.00 on the basis of the Willis-D curve.

Defendant Wynn was allowed to testify as an owner. He claimed a 6% interest in Treasure Well No. 8 (R. 700) and testified merely that his interest, as of the date of taking, was worth \$5,000 a per cent (R. 704).¹⁴

¹⁴ While Wynn's testimony did not go to the entire value of the well, on his per cent valuation that value would have been \$500,000.00.

A difficulty lay in the fact that the Government's witnesses had testified to the value of the working interests while the defendants' testimony went to the total value of the well, a fact noted by the trial court (R. 667). There was also uncertainty as to the exact royalty payable to Fletcher under his lease to Treasure Company and hence as to the accuracy of the combined royalty figure of 28.7% used by the Government witnesses. This was finally straightened out by agreement of counsel that the Fletcher royalty was 7.365%, the Burns royalty 12.03%, and the parties stipulated that the true combined royalty was 19.4%. The trial court so ruled and stated that "we will have to introduce evidence on that basis" (R. 746).

Accordingly the Government recalled the witness Stolz who, on the basis of a combined landowners' royalty of 19.4% instead of 28.7%, increased his valuation for the "total working interest" to \$126,500.00 (R. 758).

Likewise, Government witness Dodge was recalled and, on the basis of a 19.4% combined landowners' royalty, increased his valuation of "the total working interest" to \$176,314.00 (R. 779).

The defendants recalled their chief valuation witness Willis to break down his various valuations of the total mineral interests in Treasure Well No. 8 and to evaluate the total working interest in the well on the basis of a combined landowners' royalty of 19.4%. Thus, on the basis of his total value of \$1,251,000.00 on the volumetric basis and assuming no other drilling, he valued the working interests at

\$976,000, taking the working interests as 80% (R. 869). On the basis of his figure of \$875,700 for the total mineral interests, on the volumetric basis and assuming three other wells might be drilled, he valued the working interests at \$683,200.00 (R. 870). On the basis of his Willis-B decline curve, under which he had previously valued the total mineral interest at \$566,400 (R. 626), he valued the working interests at \$440,880.00 (R. 871). Counsel for the defendants stated that he was not interested in having the witness value the working interests on the basis of the \$260,000.00 total mineral interest value the witness had previously given the jury on the basis of his Willis-D decline curve (R. 872). However, on cross-examination the witness testified that, on the basis of his \$260,000.00 valuation of the total mineral interests, based on his Willis-D decline curve, the total working interests, figured on the lower combined royalty of 19.4% (he used 20% for convenience), were of a value of \$194,500.00 (R. 885). Thus, in the final analysis, the various alternatives presented to the jury were the following valuations of the total working interests:¹⁵

Government witness Stolz-----	\$126,500.00
Government witness Dodge-----	176,314.00
Defendants' witness Willis-----	976,000.00
Defendants' witness Willis-----	683,200.00
Defendants' witness Willis-----	440,880.00
Defendants' witness Willis-----	194,500.00

¹⁵ The valuations of one to two million dollars for the entire interests in the well by the witness Seepie and the apparent valuation of \$500,000.00 for the entire interests by Wynn on the basis of his percent value of \$5,000.00 were not specifically withdrawn. Nevertheless, those witnesses were not recalled to break down their

The case was given to the jury under an instruction that "your verdict as to the parcel designated 'H-I W. I.' must be predicated on the assumption that the royalty payable from the production of Treasure No. 8 Well is 19.4 per cent and not 28.7 per cent" (R. 1165) and the jury returned a verdict for "H-I W. I.—Being the total working interests in Treasure Company Well No. 8" in the sum of \$194,500.00 (R. 65).¹⁶ Judgment was entered accordingly on July 13, 1949, and no appeal was taken therefrom (R. 67-76).

On May 11, 1950, proceedings were had before Judge Westover for the purpose of determining distribution of the award. (R. 1188-1244). On October 30, 1950, the court filed its findings of fact and conclusions of law (R. 134-153) and on the same date entered judgment in accordance therewith. The court found, *inter alia*, that the Fletcher lease was referred to in the valuation trial as H-I W.I, and that the verdict fixed the value of the leasehold in the property on which Treasure Well was drilled and that the award was not made for oil to be produced, saved

valuations to a total working interest valuation based upon a 19.4% combined landowners' royalty. Moreover, under the instruction of the court, those valuations would have had to be reduced by the percentage of 19.4%. The verdict of \$194,500.00 for the working interests makes plain that the jury placed no reliance on these witnesses. Since the verdict was in the exact amount testified to by defendants' witness Willis on the basis of his Willis-D decline curve, it seems probable that the jury accepted defendants' lowest figure on the only method of estimating future production adopted by both sides, the decline curve method.

¹⁶ As hereinbefore shown (p. 14, *supra*) this total royalty of 19.4% was a combined landowners' royalty, being made up of 7.365% payable to the landowner under the Fletcher lease, and 12.03% payable to the landowner under Burns No. 1 lease.

and sold from the leasehold nor was it limited to the value of Treasure Well No. 8 (Fdg. IX, R. 138); that H-I W.I. was indicated on the map, Plaintiff's Exhibit 1, original, as referring to the Fletcher lease and that Burns No. 1 lease was marked on the map as G-3 (Fdg. X, R. 139); that in findings of fact, conclusions of law, and the judgment in a California state case brought by Scoville, Seepie, Wynn and Adamant against Treasure Company and G. de Bretteville, the well was referred to as being on the Fletcher lease (Fdg. XIII, R. 140); that the jury's verdict of \$194,500.00 established the value of the lessee's interest in the Fletcher lease (Fdg. XV, R. 140); that the leasehold containing the well Treasure No. 8 is the leasehold of the Fletcher lease and does not include the Burns No. 1 lease (Fdg. XIV, R. 140); that the verdict fixed the value of the Fletcher leasehold upon which the well was drilled (Fdg. XXXV, R. 149-150). The court concluded that the award of \$194,500.00 was not for oil, but was for the value of the leasehold on which Treasure Well No. 8 was drilled and that the well was only a part of the leasehold interests (Concl. II, R. 150-151).

Since it is clear that under these findings the judgment based thereon stands as an adjudication that the United States has not paid for the Burns No. 1 leasehold, thus exposing the Government to this further liability, the Government filed a motion to vacate those findings (R. 174-181) and requested substitute findings to the effect that in the jury trial the lessee interest in both the Fletcher lease, covering lots 9, 10, and 11 in Block 33 and in the Burns No. 1 lease, cov-

ering lots 7, 8, 35, and 36 in Block 33, was described as the working interest and was designated "H-I W.I" and that the verdict fixed the value of the lessee interest, i. e., the working interest, in the property on which the well was produced (Requested fdg. A, R. 177); that the Fletcher and Burns No. 1 leases were combined to make a minimum drill site of one acre, on which Treasure Well No. 8 was completed and produced (Requested fdg. B, R. 177); and that the lessee interest in such leasehold estate, designated H-I W. I. in the testimony and jury verdict was by stipulation of counsel, adopted by the court, agreed to be subject only to an aggregate landowners' royalty of 19.395%, of which 7.365% was payable as the Fletcher lease and 12.03% was payable on the Burns No. 1 lease, and that for purposes of the testimony and computations of witnesses it was agreed by counsel that such combined landowners' royalty of 19.395% could be called 19.4% (Requested fdg. C. R. 178).

That motion was denied on December 11, 1950 (R. 183-184), and this appeal followed.

SPECIFICATION OF ERRORS

The statement of points relied on by the United States on its appeal (R. 203-206), adopted in this Court (R. 1266), may be summarized as follows:

The district court erred:

(1) In refusing to vacate the judgment entered October 30, 1950, and in refusing to vacate findings IX, X, XIII, XIV, XV, and XXXV upon which the judgment was based, and in refusing to make substitute findings A, B, and C as requested by appellant.

(2) In finding and concluding that the award of \$194,500.00 for "H-I W. I., being the total working interest in Treasure Company Well No. 8," represented the value of the lessee's interest in the Fletcher leasehold, and that such award did not compensate for the lessee's interest in the Burns No. 1 lease.

(3) In refusing to hold that the Fletcher and Burns No. 1 leases were combined to make a minimum legal drill site of one acre, in refusing to hold that "H-I W. I., being the total working interests in Treasure Company Well No. 8," represented the value of the lessee interest in both of those leases, and in refusing to hold that the award of \$194,500.00 for such total working interest compensated for the value of the lessee interest in both of such leases.

ARGUMENT

Initially it is to be observed that the Government is not in this case subject to the usual heavy burden resting upon an appellant who seeks to overturn findings of fact. The question of whether the award of \$194,500.00 covered the lessee interest in both the Fletcher and Burns leases is determined solely by the proceedings in the valuation trial. That trial was presided over by Judge Beaumont. The distribution proceeding was later conducted by Judge Westover. Hence this is not a case where he is peculiarly fitted to pass upon questions of fact by reason of having heard and observed witnesses while testifying. That function, even before Judge Beaumont, rested with the jury. The evidence upon which Judge Westover made his findings was wholly documentary, in the

form of the reporter's transcript of the trial proceedings and testimony, with the exhibits introduced by the parties.

In this situation several courts of appeals, including this one, have taken the view that when the evidence is all documentary the appellate court is in just as good a position as the trial court to appraise the evidence and hence the trial court findings do not carry great weight. *Equitable Life Assur. Soc. v. Ireland*, 123 F. 2d 462 (C. A. 9, 1941); *Bowles v. Carnegie-Illinois Steel Corp.*, 149 F. 2d 545 (C. A. 7, 1945); *British-American Assur. Co. of Toronto, Canada v. Bowen*, 134 F. 2d 256 (C. A. 10, 1943); *Himmel Bros. Co. v. Serrick Corporation*, 122 F. 2d 740 (C. A. 7, 1941); *Fleming v. Palmer*, 123 F. 2d 749 (C. A. 1, 1941); *State Farm Mut. Automobile Ins. Co. v. Bonacci*, 111 F. 2d 412 (C. A. 8, 1940).

I

The award of \$194,500.00 for "H-I W. I., being the total working interest in Treasure Well No. 8," represented the lessee interest in both the Fletcher and Burns No. 1 leases.—The evidence placed before the jury in the valuation proceeding has already been carefully analyzed (*supra*, pp. 6-16) and it is unnecessary to repeat it here. It undeniably appears therefrom that the award for H-I W. I. actually represented the total economic value to the lessee of the future mineral production of the well. This is so because the jury was instructed in this connection to arrive at its verdict on the basis of there being payable to the landowners of the Fletcher and Burns leases

a combined royalty of 19.4% (R. 1165). And as hereinbefore unmistakably shown, the evidence of both sides placed before the jury various opinions as to the mineral value of the well to the lessee after payment of 19.4% to the landowners.

The Fletcher and Burns No. 1 leases were *oil and gas leases*, not leases for other purposes. The jury was told very early in the trial by the witness Dodge that a drill site of one acre is required by state law (R. 269) and that the four lots comprising Burns No. 1 lease were combined with the three lots in the Fletcher lease to comprise a one-acre drilling site (R. 285-286). They were also informed by this witness that "That is a lease of one acre and no additional wells could be drilled on the lease within the law" (R. 350). That proposition was never questioned by the defendants and the entire case was tried on that basis. It was thus obvious to the jury that the mineral value of the entire one-acre drill site to the operating lessee, as to the lessors, lay in the only well which could be drilled thereon.

The fact that physically the well was drilled on the Fletcher lease is of no significance. An oil and gas lease on the Fletcher lease alone had absolutely no value since no well could be drilled. Obviously when both Fletcher and Burns executed oil and gas leases to Treasure Company for the express purpose of creating a minimum drill site, and with full knowledge that only one well could be drilled, the royalties reserved in the production of oil and gas in either lease were in no wise dependent upon whether the

well would physically be drilled on one or the other. On identical reasoning the value of the combined drill site to the lessee was likewise the future economic value of the well to the lessee, whether it be on one or the other lease. That the production of the one and only possible well represented production from both leases was recognized throughout the trial by both parties as shown by the fact that both sides recognized that the combined landowners' royalty of 19.4% (12.03% to Burns and 7.37% to Fletcher) had first to be deducted. If only the Fletcher leasehold was being valued, then the deduction of the Burns royalty was improper. The combined landowners' royalty of 19.4% and the total working interest of 81.6% were component parts of the same thing—the total mineral value of the well. And just as the 19.4% represented the interest of the landowners in both leases, so the remainder of the 100% mineral value, the 80.6% working interest represented the lessee's interest in both leases.

This explains why neither side sought to value either the Fletcher lease as a unit or the Burns lease as a unit. The plain fact was recognized by both sides that, so far as the lessee was concerned, the lessee's interest in both leases was a unitary interest in the only well that could be drilled on the combined leases.

That for purposes of evaluating the working interest in Treasure Well No. 8 the combined leases as a unit were being valued is further shown by the record. Thus the Government witness Dodge, during

whose initial appearance on the stand the symbol H-I Working Interest was first developed, testified as follows: "That is *a lease of one acre* and no additional wells could be drilled on the lease within the law" [italics supplied] (R. 350). And again (R. 352-353), in discussing Johnson's Ex. A, he testified that "The first paragraph contains Lots 9, 10, and 11 and refer to the so-called Fletcher parcel which has been labeled H. The next paragraph includes Lots 7, 8, 35, and 36 and refers to the four additional lots which I believe have been labeled G-3, if I am not mistaken, * * * And those are the lots and comprise *the entire lease* upon which Treasure well was drilled." (Italics supplied.) Certainly this witness and the other Government witness who followed him were testifying to a lessee value in both leases, and the jury must have so understood it. And since defendants ultimately adopted the Government's approach, merely seeking to establish a higher value on the basis of larger estimates of future production, and never suggested that only the Fletcher lease was involved, it follows that the jury understood that their testimony also went to both leases.

That the defendants considered the combined leases as a single leasehold is conclusively shown by their Exhibit S, Original, which is a map in colors. As hereinbefore stated, in addition to the Burns No. 1 lease which was combined with the Fletcher lease to make Treasure Well No. 8 possible, there were also in the proceeding, but in no way involved here, two other leases known as Burns No. 2 and Burns No. 3.

During questioning by defendants of their witness Wynn regarding Adams, Scoville and Wynn Exhibit S, the following occurred (R. 697-698):

Q. Did you mark on a map in colors the designation of *the Treasure well leasehold* and the two Burns leaseholds? [Italics supplied.]

A. Yes, sir, I did.

Q. I show you a map marked in red, purple, and green, and ask you if you made those markings?

A. Yes, I did.

* * * * *

Q. (By Mr. ALLEN): Now will you step to the board here and point out the areas which you have marked? What is the purple area?

* * * * *

The WITNESS: The purple area consists of the one-acre drill site on which the Treasure well is now located. [Italics supplied.]¹⁷

Thus, on defendants' own Exhibit S placed by them before the jury, Burns No. 1 lease was not considered by them as such but, coupled with the Fletcher lease, as comprising what defense counsel called "the Treasure well leasehold." The same thing is reflected in the answer of Adamant Co., Walter B. Scoville and Harry Wynn, where it is alleged "That Treasure Well No. 8 is located upon the drill-site composed of the two above leaseholds" [the Fletcher and Burns No. 1 leasehold] (R. 16). See also the same allegations by Adamant Company in its two separate petitions for partial distribution (R. 26, 58),

¹⁷ Reference to Exhibit S shows the purple area as comprising all seven lots of the Fletcher and Burns No. 1 leases.

and in the answer of defendant C. F. Johnson (R. 33).

The district judge in the distribution proceeding misconstrued the symbols "H-I W. I." and "G. 3." In Finding IX it is stated that "the Fletcher lease was referred to and described as 'H-I W. I.'." That is not so. The Fletcher lease was referred to as "H" (R. 287). But as already shown, "H-I W. I." was not a sublease or any interest in land, but a standard of valuation adopted by both sides. This is clearly shown by the testimony of the witness Dodge who first used it. In view of the multiplicity of letters and figures which were being placed on the map, Plaintiff's Ex. 1, Original, at the suggestion of the court it was agreed that the symbols would be placed up in the white portion above the area taken and linked to the location on the map by a line (R. 260). After Dodge stated that he had placed the symbol "H-I Working Interest to designate the *value* which he had given is the working interest in the well" (R. 307), the court observed: "Mr. Dodge, you have drawn the 'H-I' so that it comes down to that orange part there [obviously the Fletcher tract]; what did you intend?" The witness replied: "Draw it *to the well*, because it is only an interest in the profits of the well and does not attach to the land" (Italics supplied) (R. 308). Obviously the witness was using the symbol as representing the value of the well to the lessee on both leases and not as representing the Fletcher lease alone. Nowhere in the record did the defendants intimate any different understanding.

That the presence of the letter H, which had been used to designate the Fletcher lease, in no wise indicated that H-I W. I. was limited to the Fletcher lease is also otherwise shown. During examination of the witness Stolz regarding the value of the combined landowners' royalty interest, some confusion resulted from the fact that no symbol for that combined royalty had been used, and it was finally straightened out by using "H-I" for the combined royalty interest (R. 399), to distinguish it from the other component part of 100% value of the well, the total working interest. And just as all present, including the jury, understood that H-I covered the *lessor's or landowner's* interest in both leases, so H-I W. I. was understood as covering the lessee's interest in both of those two leases.

Similarly the court below erred when it stated that "The Burns No. 1 lease is marked on said map as 'G-3' " (Fdg. X, R. 139). As fully developed in the statement (*supra*, pp. 6-8) G-3, under the settled pattern employed, referred to any overriding royalty accruing to the holder of Herndon Lease West of Falmouth Avenue under the sublease from such holder to Burns, and the value of which was credited by Dodge to the landowners as part of their total landowners' royalty in excess of \$40,000 under their lease to Herndon, since by reason of the low royalty there was no overriding royalty. Thus at R. 286-287, it is clearly demonstrated that G-3 did not represent the lessee Treasure Company's interest in the Burns No. 1 lease. The witness Dodge, in response to a question of the court testified that "G-3 represents

the landowner's royalty on four lots" and that it was included in "G". There being no overriding royalty, "G-3" was eliminated as a separate parcel.

We agree with the court below (Fdg. IX, R. 138; Concl. II, 150) that H-I W. I. was not an award for oil as such. It was an award for the two leases. The parties simply recognized that the estimated profits accruing to the lessee from the one well that could be drilled on the combined site was the only standard of value to be applied. No other evidence was introduced by either side.

Note should also be made of the trial court's conclusion "that said well was only a part of the leasehold interests." (Concl. II, R. 151.) If by that is meant that the leaseholds had a value for other purposes than the mineral production of the well, it too is answered by the record. During a discussion of proposed instructions to be given the jury, the Government objected to defendants' proposed Instructions 1, 3 and 5 on the ground that they suggested the use for purposes other than that for which the property was used, and that the extraction of oil and gas was the highest and best use and the only use defendants were permitted to put this property to under the lease (R. 963, 965). The court observed there had been no evidence directly to the point (R. 965). Defendants had in mind that the property could be given value on the basis of the use the Government was making of it, gas storage. Counsel for defendants finally agreed that there was no evidence of value for any use other than extraction of oil and gas and that "it [the instruction] is not applicable" (R. 967).

It was thus conceded that the standard of valuation on the basis of the potential value of the well reflected the whole value of the property to the lessee.

Finally, in their statement of points and authorities in support of their motion for new trial following the judgment here appealed from, defendants Adamant Company, Scoville, Seepie and Wynn stated (R. 159):

The evidence is sufficient to establish the Finding No. XIV that "the Jury's verdict of \$194,500.00 established the value of the lessee's interest in the Fletcher lease, Lots 9, 10 and 11, Block 33, Tract 9809, on which Treasure Well No. 8 was located," *and the evidence is also sufficient to establish the value of the lessee's interest in the entire leasehold, comprised of 7 lots, upon the grounds that the only value of the leasehold was the value of the working interests in Treasure Well No. 8 (except, of course, the landowners fee title and landowners royalty—which was withdrawn from the jury).* [Italics supplied.]

There can be no clearer concession that the evidence of both parties as to a single value for those working interests, and the fixing of that value by the jury, embraced the lessee's interest in all seven lots, which are here again referred to by defendants as a single or "entire leasehold," and that payment of that amount compensated the lessee for its interest in both leases.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the cause remanded to the district court with instructions to make appropriate findings

to the effect that the award of \$194,500.00 covered the lessee's interest in both the Fletcher and Burns No. 1 leases.

Respectfully submitted.

WM. AMORY UNDERHILL,
Assistant Attorney General.

ERNEST A. TOLIN,
*United States Attorney,
Los Angeles, California.*

AUGUST WEYMANN,
*Special Attorney, Department of Justice,
Los Angeles, California.*

ROGER P. MARQUIS,
FRED W. SMITH,
*Attorneys, Department of Justice,
Washington, D. C.*

NOVEMBER 1951.

No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, etc., et al.,

Appellant and Respondent,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF LOS ANGELES,
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,
et al.,

Defendants,

and

RECONSTRUCTION FINANCE CORPORATION, ASSIGNEE OF
TREASURE COMPANY, THE ADAMANT COMPANY, WALTER
B. SCOVILLE, JOE SEEPLE, HARRY WYNN, HERSCHEL
BULLEN, MARY N. BULLEN, J. C. HAYWARD and
MARY S. HAYWARD,

Respondents and Cross-Appellants.

Brief for Reconstruction Finance Corporation,
Assignee of Treasure Company, Appellant.

FILED

NOV 20 1951

JOHN H. RICE AND

JULIUS A. LEETHAM,

417 South Hill Street,
Los Angeles 13, California,

Attorneys for Reconstruction Finance Corporation.

PAUL P. O'BRIEN
CLERK

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BULLEN, MARY N. BULLEN, J. C. HAYWARD and
MARY S. HAYWARD,

Respondents and Cross-Appellants.

Brief for Reconstruction Finance Corporation,
Assignee of Treasure Company, Appellant.

Jurisdiction.

This appeal is brought from a judgment entered on October 30, 1950, which was rendered by the Honorable Harry C. Westover, Judge of the United States District Court for the Southern District of California, Central Division. The judgment orders distribution of an award

in a condemnation action brought by the United States Government under the authority of the Act of Congress, approved January 22, 1932 (15 U. S. C. 601-617), as amended, and of Public Law 507, 77th Congress, approved March 27, 1942, and pursuant to Executive Order No. 9217, issued by the President of the United States on August 7, 1942, 7 F. R. 6177. The said Acts of Congress and the said Executive Order of the President authorized the Reconstruction Finance Corporation, which in this brief is referred to as "RFC," to acquire, by condemnation, property deemed necessary for military, naval, or other war purposes. In pursuance of this authority, the United States Government, acting for the use of RFC, seized on the 28th day of September, 1942, certain property in Los Angeles County, California, for the purpose of establishing an underground reservoir for the storage and conservation of natural gas in the Los Angeles, California, industrial area to relieve a shortage of gas which would impede the nation's war effort. RFC appears in this appeal solely as assignee of the interest of Treasure Company, a California corporation, in the condemnation award amounting to \$194,500.00.¹

A motion by RFC, as assignee of Treasure Company, to set aside the Findings of Fact, Conclusions of Law and Judgment, and for a new hearing on the distribution of

¹The net amount of the award to be distributed is \$191,700.00 after deducting the sum of \$2,800.00 as costs of a Special Master-ship, in accordance with a stipulation of counsel in this case.

the award was denied on December 11, 1950 [R. 183-184]. A Notice of Appeal was filed by RFC, as assignee of Treasure Company, on January 9, 1951 [R. 188-189]. The District Court had jurisdiction of this case under the Act approved March 27, 1942, *supra*, and this Court has jurisdiction to entertain this appeal under 28 U. S. C. 1291.

Questions Presented.

1. Where a condemnation award is made by a jury for the "total working interest" of a lessee under oil and gas leases covering realty on which a producing oil well is located, and where it was stipulated by counsel in open court that the drill site of the well comprised two separate leasehold estates owned by the lessee, and where the whole testimony of valuation was directed toward the projected net profit to be realized by the lessee out of the well, taking into consideration the estimated production, estimated expenses and the total landowners' royalties payable under the two leases, is not the compensation award for the "total working interest" equivalent to an award for the lessee's total leasehold estate in the two leases?
2. Where a final judgment of a state court has adjudicated the respective rights of a lessee and of certain assignees of the lessee in several oil and gas leases and has limited the rights of the assignees to a participating interest in one of the leases comprising

three lots, and where the Federal Government later condemned the lessee's interest in the lease of three lots and also in an adjacent lease comprising four lots, and where in the condemnation proceeding the lessee and the assignees were named co-defendants and evidence was presented by both the Government and by the assignees that the drill site for a producing oil well consisted of both the lease of three lots and the adjacent lease of four lots, and where no evidence was offered as to the separate value of the lessee's interest in each of the two leases and where a condemnation award was made for the lessee's "total working interest" in the producing oil well, are not the respective participating interests of the assignees limited to that distributive share of the total award which is in direct proportion to the area which the one lease of three lots bears to the total area of the drill site comprising seven lots?

3. Where the lessee of certain land whose leasehold interest has become the subject of a condemnation award and one who claims a right in the leasehold by assignment from the lessee are parties litigant in a pending state court action in which their respective rights are to be determined, is it not an improper preempting of jurisdiction on the part of the United States District Court in making distribution of the condemnation award to make a decision involving the ultimate rights of the parties litigant in the state court action?

Statement.

The condemnation award, which is the subject of this appeal, stands for the leasehold interests of RFC's assignor, Treasure Company, in certain oil and gas leases.

RFC's rights, as assignee, exist under an instrument of assignment entitled "Assignment of Rights under Award," which instrument was duly executed and delivered, for a valuable consideration, to RFC on March 2, 1950, by Treasure Company [Treasure Company's Ex. WW, see R. 202; Fdg. XXIII, R. 145] and was duly recorded on March 10, 1950, in Book 32531 at Page 247 of Official Records of the County of Los Angeles, State of California. Thus RFC stands in the shoes of Treasure Company in this appeal and asserts no rights, as a distributee of the award, other than the rights of Treasure Company.

The United States of America, which appeared as a use-plaintiff² in the valuation trial in the District Court and as a party intervenor in the proceedings for distribution of the award, appears in this appeal on the grounds that the judgment entered on October 30, 1950, by Judge Westover, which orders distribution of the award, is inconsistent with both the verdict of the jury in this proceeding [R. 63-66] and the judgment upon the said verdict entered on July 13, 1949, by the Honorable Campbell E. Beaumont, Judge of the United States District Court for

²The condemnation proceeding was brought by the United States of America for the Use of RFC, acting in behalf of Defense Plant Corporation, a wholly-owned subsidiary corporation. RFC succeeded to all of the rights, powers and duties of Defense Plant Corporation and assumed all of its obligations and liabilities pursuant to the Act of Congress dated June 30, 1945, 59 Stat. 310.

the Southern District of California, Central Division [R. 67-76]. The United States of America, in prosecuting this appeal, does not represent RFC as a claimant to the award but has no interest adverse to that of RFC.

All of the parties in this appeal, other than the United States of America, are claimants to a share of the award and their respective claims are, in each instance, traceable to the original rights of Treasure Company, as lessee, in oil and gas leases.

The Adamant Company, a corporation, and Walter B. Scoville appear in this appeal as claimants to a share of the award by virtue of their respective assignments of participating royalties [Fdg. XVI, R. 140] in a certain lease known as the "Fletcher Lease" [Adamant, Scoville, Wynn, Ex. "F," R. 1273; R. 202] which was a lease dated March 11, 1933, granted by Edwin N. Fletcher, Jr. and Mary A. Fletcher, his wife, as lessors,³ to Treasure Company covering Lots 9, 10 and 11 of Block 33, Tract 9809, as recorded in Book 145 at Page 91, *et seq.* of Maps, in the Official Records of Los Angeles County, State of California.

Herschel Bullen, Mary N. Bullen, J. C. Hayward and Mary S. Hayward appear in this appeal as claimants to a share of the award by virtue of their respective assignments of participating royalties made by Walter B. Scoville which constitute a part of the aforesaid royalties

³The Fletcher Lease was a sublease under a Master Community Lease designated as the "Herndon Lease West of Falmouth Avenue." [Adamant, Scoville, Wynn Ex. "A," R. 1272; R. 202.] The Fletchers had acquired an interest in the three lots under a sublease [Adamant, Scoville, Wynn, Ex. "C," R. 1272].

asserted by Walter B. Scoville in the Fletcher Lease [Fdg. XVII, R. 141].

Harry Wynn appears in this appeal as a claimant to a share of the award by virtue of assignments allegedly made directly to him by Treasure Company of participating royalties in certain of its leasehold estates [Fdg. XVI, R. 141; Concl. VI, R. 152], and by virtue of an assignment made to him by Walter B. Scoville [Fdg. XXVI, R. 146].

Joe Seepie is represented in this appeal and was represented in the court below by Leland J. Allen, Esq., who was also counsel for Walter B. Scoville. Mr. Allen stated in open court that Walter B. Scoville and Joe Seepie will adjust their respective interests out of court and, accordingly, the court below made no finding in reference to the respective interests of these two parties [Fdg. XXXI, R. 148].

RFC's assignor, Treasure Company, had been involved in litigation with all of the claimants to the award (except the assignees of Walter B. Scoville) prior to the commencement of the condemnation proceedings [Fdg. III, R. 136]. An action designated as Cause No. 441484 had been filed by Walter B. Scoville, J. O. Seepie, Harry Wynn and The Adamant Company against one G. de Bretteville and Treasure Company in the Superior Court of Los Angeles County, California, in which the plaintiffs sought the issuance of an injunction against Treasure Company, the rendering of an accounting and the appointment of a receiver for Treasure Company. This litigation resulted in a judgment rendered by Judge Joseph W. Vickers, which judgment in this brief will be referred to as the "Vickers' Judgment" [Adamant, Sco-

vile, Wynn, Ex. "E," R. 1273; R. 202]. The Vickers' Judgment was adverse to the plaintiffs and was appealed by them, but the judgment was affirmed by the California State District Court of Appeal, *Scoville, et al. v. de Bretteville, et al.*, 50 Cal. App. 2d 622, 123 P. 2d 616 (1942) [Fdg. IV, R. 137].

The Vickers' Judgment is important in this appeal because the court below has made conclusions of law that the Vickers' Judgment establishes the law to be followed in this proceeding [Concl. I, R. 150] and that by reason of the doctrine of *res judicata* the interests of the parties who are claimants to the award were established by the Vickers' Judgment [Concl. VIII, R. 152].

The Vickers' Judgment involved the construction of a certain written contract dated April 5, 1938, which was entered into between the Treasure Company as First Party, The Adamant Company as Second Party, and Walter B. Scoville as Third Party [Adamant, Scoville, Wynn Ex. "D," R. 1272; R. 202]. Treasure Company held leasehold interests in various oil and gas leases in the Del Rey Hills in Los Angeles County and the said contract pertained to a proposed drilling program by the parties involving the aforesaid Fletcher Lease, a lease known as "Burns Lease No. 1" [Adamant, Scoville, Wynn Ex. "G," R. 1273; R. 202], a lease designated as "Burns Lease No. 2," and a lease designated as "Burns Lease No. 3."⁴

Prior to the execution of the said contract, Treasure Company had endeavored to drill an oil well known as

⁴"Burns Lease No. 2" and "Burns Lease No. 3" are not involved in this litigation.

“Treasure Well #8” (which in this brief is referred to as “Treasure Well”) on the Fletcher Lease but could not complete the undertaking because of financial difficulties [Fdg. II, R. 136]. The contract provided that funds were to be furnished by The Adamant Company for the completion of the well.

The respective rights of the parties under the said contract became a subject of dispute which gave rise to the litigation resulting in the Vickers’ Judgment [Fdg. III, R. 136].

One of the holdings of the Vickers’ Judgment was that the plaintiffs in the action, The Adamant Company, Walter B. Scoville and their assigns, lost as of January 31, 1939, their respective interests under the contract in all leaseholds described in the contract, other than the leasehold interest on which Treasure Well was located.

Paragraph 1 of the Vickers’ Judgment particularly describes the lease upon which Treasure Well is situated as follows:

“All that real property in the City of and County of Los Angeles, State of California, known as Lots 9, 10 and 11 of Block 33, in Tract 9809, as per map recorded in Book 145, Page 91, *et seq.* of Maps, Records of said Los Angeles County, California.” [Fdg. XII, R. 139.]

Paragraph 3 of the Vickers’ Judgment states that the contract was terminated as of January 31, 1939, “save and except that the plaintiffs, The Adamant Company and Walter B. Scoville and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well ‘Treasure No. 8’ is drilled,

to-wit: Twenty-five per cent (25%) therein to The Adamant Company, a corporation, and Nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any assignments made, and subject to their pro rata share of the completion, operating and maintenance costs and charges of said well." [Adamant, Scoville, Wynn Ex. "E," R. 1273; R. 202.]

The question of the payment of the completion, operating and maintenance costs and charges of Treasure Well and the parties responsible for such payment is now pending in a collateral accounting action in another department of the United States District Court for the Southern District of California and Judge Westover made no Findings of Fact in reference to the same [Fdg. XXXVI, R. 150].

The complaint filed by the United States Government in this suit named Treasure Company, The Adamant Company, Walter B. Scoville, Harry Wynn, Joe Seepie, Herschel Bullen, Mary N. Bullen, J. C. Hayward and Marion S. Hayward, as co-defendants [R. 3].

Treasure Company filed a separate answer claiming damages for its leasehold estate in the Fletcher Lease, the Burns Lease No. 1, the Burns Lease No. 2, and the Burns Lease No. 3, in the aggregate amount of \$2,000,000.00 [R. 35-52]. However, negotiations were commenced by the Government with Treasure Company for the settlement of all of its claims prior to the commencement of the trial and as a result of these negotiations, Treasure Company did not actually participate in the valuation trial. RFC, as assignee of Treasure Company, entered its appearance and did participate in the hearings before Judge Westover involving the distribution of the award.

Notwithstanding the holdings of the Vickers' Judgment,⁵ The Adamant Company, Walter B. Scoville and Harry Wynn filed a joint answer to the complaint in condemnation on December 8, 1943, in which The Adamant Company alleged ownership of a 25% participating royalty interest in the Fletcher Lease, the Burns No. 1 Lease, the Burns No. 2 Lease and the Burns No. 3 Lease [R. 14-17], and Walter B. Scoville alleged an ownership of 19% participating royalty interest in all four of said leases, admitting that he had assigned 1% of his ownership to Herschel Bullen and wife, and 1% to J. S. Hayward and wife [R. 20]. Harry Wynn alleged, in the joint answer, a 5% participating royalty interest in the Fletcher Lease and in the Burns No. 1 Lease [R. 22].

The jury trial to determine the value of the lessee's interest under the Fletcher Lease and the Burns No. 1 Lease commenced on April 19, 1949, and during the trial settlement was made by the Government with the respective landowners of both the Fletcher Lease and the Burns No. 1 Lease, so that the question of the value of the lessors' residual interest was taken from the jury, leaving for the determination of the jury the value of the lessee's interest in the Fletcher leasehold and in the Burns No. 1 leasehold [R. 210; Fdg. VII, R. 138].

The jury trial before Judge Beaumont in no way concerned itself with the Vickers' Judgment,⁶ inasmuch as the issue before the jury was the valuation of the lessee's

⁵The petition of The Adamant Company, Walter B. Scoville and Harry Wynn for distribution of the award alleges that the Vickers' Judgment became final on May 20, 1942 [R. 82].

⁶The Vickers' Judgment was mentioned incidentally in argument [R. 1079, 1104].

interest in the two leaseholds and the question of the distribution of the award as between the several co-defendants was not placed before the jury [R. 1073].

The Government introduced a large map as an exhibit [Pltf. Ex. 1, R. 1272 and R. 1276] which reflected the various parcels included in the several leaseholds which had been seized. The Fletcher Lease was designated as "H" on the map by plaintiff's witness, Dr. John F. Dodge [R. 287], and the Fletcher Lease was identified on the map in orange color [R. 308].

The symbol "G" on Plaintiff's Exhibit 1, designated the landowners' royalties under the Master Community Lease known as the "Herndon Lease West of Falmouth Avenue" [R. 283-284] and the entire Herndon Master Community Lease was colored in bluish green [R. 283]. Various subleases under the Herndon Master Community Lease were designated on Plaintiff's Exhibit 1 as "G-1," "G-2," and "G-3" [R. 284, 285]. The symbol "G-3" on Plaintiff's Exhibit 1, designated the landowners' royalty in the Burns Lease No. 1 containing the four lots which were joined with the three lots of the Fletcher Lease to comprise the drill site for Treasure Well, and these four lots, to-wit: Nos. 7 and 8, 35 and 36, of Block 33, were identified on the map by a brownish-orange color [R. 285, 286]. Dr. Dodge explained that it was unnecessary for him to give a valuation for the parcel designated "G-3" (landowners' royalties), inasmuch as "G-3" was part of the larger parcel "G" and he had previously given a valuation for the larger parcel "G"⁷ [R. 287].

⁷The value of the lessors' interest designated as parcel "G" was settled out of court.

Dr. Dodge testified that Treasure Well was drilled on the Fletcher Lease which had been identified as parcel "H," but that it was subject to a royalty interest accruing both to the landlords under the Fletcher Lease and to the landlords under the Herndon Master Community Lease, and he was asked by the attorney for the Government what in his opinion was the value of the total working interest in Treasure Well. Dr. Dodge replied that the total working interest under conditions of total royalty amounting to 28.7%,⁸ consisting of 16.67% to the Fletcher landlords and 12.03% to the Herndon Master Community Lease (through the Burns No. 1 sublease) was \$150,-830.00 [R. 306, 307]. Before the witness explained in detail his definition of working interest, he marked upon Plaintiff's Exhibit 1, at the request of counsel for the Government, the symbol "H-1, W.I." to designate the value which he was assigning to the working interest in Treasure Well [R. 307]. The court admonished the witness that he had drawn the symbol so that it came down to the orange part on the map and asked him what he intended to do, and the witness replied: "Draw it to the well because it is only an interest in the profits from the well and does not attach to the land" [R. 308].

One of the principal issues in this appeal is the dispute among the claimants to the award as to what was the ac-

⁸For purposes of determining the prospective net profits of Treasure Well during its anticipated life, after deduction of estimated expenses and landowners' royalties, it was subsequently stipulated that the figure 28.7% total royalties, was not correct. The Fletcher Lease royalty was agreed to have been 7.365% and the Burns Lease No. 1 was agreed to have been 12.03%, making a total royalty of 19.395%. Counsel stipulated that the total royalties would be considered as 19.4% [R. 746].

tual significance of the symbol "H-1, W.I." which the jury was requested to evaluate.

One of the defendants in the valuation trial, C. F. Johnson,⁹ appearing *in pro. personam*, stated that it was not clear to him as to whether the valuation figure of \$150,830.00 applied to the landowners' royalty and overriding royalties or to the value of what was left after they were taken out [R. 308]. Dr. Dodge replied that the value of \$150,830.00 [which he has designated as "H-1, W.I."] was reached after the landowners' royalty of 12.03% and 16.67% were taken out and represented the profits which accrue to the operators of the well [R. 309]. After further elucidation, Judge Beaumont summed up the statements of Dr. Dodge, saying: "It is just when an operator desires to lease property for the purpose of operating and they enter into a lease, the landowner gets a certain percentage, the operator drills the well, takes chances on finding oil, and then what he makes out of the rest of it is his" [R. 310]. The witness agreed with the court's conclusion.

It should be noted that the concept of a "working interest" was also used in connection with the evaluation of other parcels involved in the condemnation but not involved in this appeal. Dr. Dodge testified with respect to another oil well known as well "Herndon 29-2" that the working interest designated as "G-1, W.I." was arrived at on the basis of money profit to be derived from the well [R. 332].

⁹The claim of the defendant Johnson was settled by the Government out of court prior to the verdict of the jury.

Under cross-examination, Dr. Dodge was asked if the figure of \$150,830.00 for the working interest in Treasure Well was based upon prospective operating profits and he answered: "That is correct; it is based upon approximately a 17-year life, a total future recovery of close to 350,000 barrels of oil, as a matter of fact 344,800 barrels of oil and accompanying gas and gasoline * * *" [R. 333]. Dr. Dodge, still on cross-examination, further testified that his definition of "working interest" presupposed a net recovery in the operation of a well after payment of the operating expenses and subject to the payment of the landowners' royalties [R. 343].

The Government introduced a second expert witness, Mr. Harry P. Stolz, who stated that he was familiar with the Plaintiff's Exhibit 1 and was familiar with the various markings that Dr. Dodge had made thereon [R. 384]. He assigned a valuation for the working interest of Treasure Well at \$97,029.00 [R. 397].

Robert S. Burns, one of the landlords of the Burns Lease No. 1, was called as a witness by the Government and on direct examination testified that Lots 7, 8, 35 and 36 of Block 33 were subleased to Treasure Oil Company to be joined with Lots 9, 10 and 11 in Block 33 to make up the drill site of one acre for Treasure Well No. 8 [R. 719-720].

Dr. Robin Willis was the principal expert witness for the defendants, The Adamant Company, Walter B. Scoville, and Harry Wynn. His testimony on direct examination did not follow the theory of Dr. Dodge and of Mr. Stolz in evaluating the working interest of Treasure Well, but instead was addressed to the fair market value of the entire mineral estate. The court felt that this di-

vergence of methods of evaluation would be confusing to the jury and on several occasions requested that counsel have their respective expert witnesses testify on some agreed upon basis of evaluation [R. 605, 622, 665].

Ultimately, there was agreement between counsel for the Government and counsel for the defendants on the methods to be used by the witnesses in evaluating the leasehold interests of the lessee and a ruling of the court was obtained [R. 746]. The witnesses Dodge, Stolz and Willis returned to the stand to revise their valuations on the basis of "total working interests" in Treasure Well, using the agreed upon landowners' royalty of 19.4% [R. 758, 779, 885].

The jury was thereupon instructed by Judge Beaumont that "your verdict as to the parcel designated 'H-1, W. I.' must be predicated on the assumption that the royalty payable from the production of Treasure No. 8 well is 19.4% and not 28.7%" [R. 1165]. The verdict of the jury for "H-1, W. I.," being the total working interest in Treasure Well No. 8, was \$194,500.00 [R. 65]. On July 13, 1949, Judge Beaumont entered judgment upon the verdict ordering the United States of America to pay out of the funds previously deposited in the registry of the court for "(H-1, W. I.) total working interests in Treasure Company well No. 8, \$194,500.00" [R. 67-79].

There was no appeal from the judgment entered by Judge Beaumont which retained jurisdiction for purposes of apportioning and distributing the award. Subsequently, Judge Beaumont was assigned to another Division of the District Court and the cause was thereupon transferred to Judge Westover.

On February 4, 1950, The Adamant Company, Walter B. Scoville and Harry Wynn filed a petition for distribution of the award [R. 79-94], in which The Adamant Company claimed \$60,328.75, with interest, Walter B. Scoville claimed \$41,023.55, with interest, and Harry Wynn claimed \$14,478.90, with interest.

On February 11, 1950, Joe Seepie filed a petition for distribution [R. 96-100] claiming \$41,023.55, with interest. The petition of Joe Seepie alleged in paragraph 2 that he had acquired a nineteen 1% working interest in Treasure Well and "that said working interests were taken in the name of Walter B. Scoville by mutual consent of Petitioner and said Walter B. Scoville" [R. 97].

On February 14, 1950, Herschel Bullen, Mary N. Bullen, his wife, J. C. Hayward and Mary S. Hayward, his wife, filed a petition for distribution [R. 101-125] in which they claimed the sum of \$10,000.00, with interest, plus the additional sum of \$4,826.30 with interest, plus a further indeterminate amount to be established by an accounting.

Hearings were commenced before Judge Westover on May 11, 1950, for the purpose of determining the distribution of the award. RFC, as assignee of Treasure Company, filed no petition for distribution but entered its appearance in the hearings before Judge Westover as assignee of Treasure Company and a claimant to a share of the award.

At the conclusion of the hearings, Judge Westover handed down a Memorandum of Decision and requested counsel for The Adamant Company, Walter B. Scoville and Harry Wynn to prepare Findings of Fact and Conclusions of Law, in accordance therewith, for the approval

of the court. Hearings were thereupon held on the proposed Findings and Conclusions and on October 30, 1950, Judge Westover filed his Findings of Fact and Conclusions of Law [R. 134-153] and entered judgment in accordance therewith.

Judge Westover found, *inter alia*, that the symbol "H-1, W. I." was indicated on the map, Plaintiffs' Exhibit 1, as referring to Lots 9, 10 and 11, of Block 33, Tract 9809, which is the Fletcher Lease [Fdg. X, R. 139]; that in the jury trial the Fletcher Lease was referred to and described as "H-1, W. I." and that the jury's verdict of \$194,500.00 for "H-1, W. I." fixed the value of the leasehold interest in the property on which Treasure Well was drilled, and that the award was not intended and was not made for oil produced, saved and sold or to be produced, saved and sold from the leasehold, nor was it limited to the value of Treasure Well No. 8 [Fdg. IX, R. 138, 139]; that the jury's verdict established the value of the lessee's interest in the Fletcher Lease on which Treasure Well No. 8 was located [Fdg. XIV, R. 140]; that the leasehold containing the well, Treasure No. 8, is the leasehold of the Fletcher Lease and does not include the Burns No. 1 Lease [Fdg. XV, R. 140]; that the monies due to all of the parties in this action are due because of their respective interests in the leasehold known as the "Fletcher Leasehold" [Fdg. XXIX, R. 147]; that this action was filed to condemn land and personal property, and that the jury's verdict of \$194,500.00 fixed the value of the Fletcher Leasehold upon which Treasure Well No. 8 was drilled [Fdg. XXXV, R. 149-150]; and that there is an action pending in the Superior Court of Los Angeles County between Harry Wynn and Treasure Company with respect to which the court made no find-

ings, the merits of said action and the rights to bring the same being immaterial to the issues of this case [Fdg. XXXVI, R. 150].

Judge Westover made a Conclusion of Law that the rights of The Adamant Company and Walter B. Scoville to the award were controlled by the Vickers' Judgment [Concl. IV, R. 151]; that Harry Wynn held valid assignments from Treasure Company totalling 5% royalty interest [Concl. V, VI, R. 152]; and accordingly, in his judgment, he apportioned the remaining balance of the award in the amount of \$191,700.00 as follows:

Reconstruction Finance Corporation,	
51 per cent, or the sum of.....	\$97,767.00
Adamant Company, 25 per cent, or	
the sum of	47,925.00
Walter B. Scoville, 16 per cent, or the	
sum of	30,672.00
Harry Wynn, 6 per cent, or the sum	
of	11,502.00
H. Bullen and Mary N. Bullen, 1 per	
cent, or the sum of.....	1,917.00
J. C. Hayward and Marion S. Hay-	
ward, 1 per cent, or the sum of.....	1,917.00

[R. 155].

On November 9, 1950, The Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn filed a motion to vacate the judgment and for a new trial of the cause

[R. 158-168]. This motion was supported by the following arguments, *inter alia*:

1. "The evidence is sufficient to establish the Finding No. XIV that 'the Jury's verdict of \$194,500.00 established the value of the lessee's interest in the Fletcher Lease, Lots 9, 10 and 11, Block 33, Tract 9809, on which Treasure Well No. 8 was located,' *and the evidence is also sufficient to establish the value of the lessee's interest in the entire leasehold comprised of 7 lots*, upon the grounds that the only value of the leasehold was the value of the working interests in Treasure Well No. 8 (except, of course, the landowner's fee title and landowner's royalty—which was withdrawn from the jury by the plaintiff)" [R. 159-160]. (Emphasis added.)
2. "The said Contract (contract of April 5, 1938) created a joint venture in which the Treasure Company held the title to all of said leases for the benefit of itself, The Adamant Company and Walter B. Scoville, and even though the Vickers' Judgment rules that said contract was terminated, said case cannot divest The Adamant Company and Scoville of their interests in the Burns' Leases, nor change the fact that Treasure Company held the title as lessee for the joint adventure and the joint benefit of The Adamant Company and Walter B. Scoville and itself" [R. 160].
3. "The evidence is insufficient to sustain the latter part of Finding XXXIII, reading as follows: 'Neither The Adamant Company, nor Walter B. Scoville re-

tained any interest whatsoever in the Burns No. 1 Lease, nor in the Burns No. 2 Lease, nor in the Burns No. 3 Lease.'

"Under the contract of April 5, 1938, and the Vickers' Judgment these parties did not lose their property rights in these leases but only the right of management.

"The Vickers' Judgment exceeds its jurisdiction in any attempt to terminate those interests.

"The plaintiff in the present action was not a party to the Vickers' accounting case.

"The contract of April 5, 1938 is still existent as to these claimants' property rights in the leaseholds and such contract is not merged into the Vickers' Judgment." [R. 167-168].

Motions to vacate the judgment and for a new hearing on the distribution were also filed by the United States of America as a party intervenor on November 10, 1951 [R. 174-181], and by Herschel Bullen and Mary N. Bullen, his wife, and J. C. Hayward and Mary S. Hayward, his wife, on November 7, 1950 [R. 156-157].

A motion to set aside the Findings of Fact, Conclusions of Law and Judgment and for a new hearing was also filed by RFC, as assignee of Treasure Company, on November 9, 1950 [R. 168-174]. In support of this motion, RFC, as assignee of Treasure Company, argued, *inter alia*, that the evidence in the jury trial establishes that the award of \$194,500.00 stands for Treasure Company's interest as lessee in the seven lots comprising the Fletcher

Lease and the Burns No. 1 Lease, and that inasmuch as the rights of The Adamant Company, Walter B. Scoville and their assigns to the award are relegated under the Vickers' Judgment to the Fletcher Lease alone, the court should have ordered distribution of the net balance of the award as follows:

To the Adamant Company, 25% of $\frac{3}{7}$ of \$191,700.00;

To Walter B. Scoville, and his assigns, 19% of $\frac{3}{7}$ of \$191,700.00;

To RFC, as assignee of Treasure Company, the remainder of the net award.

All of the respective motions for the vacation of the judgment and for a new hearing were denied by Judge Westover on December 11, 1950 [R. 183-184] and RFC, as assignee of Treasure Company, thereupon filed this appeal.

Specifications of Error.

The District Court was in error:

(1) In refusing to vacate its judgment entered October 30, 1950; and in refusing to vacate its findings IX [R. 138], X [R. 139], XIV [R. 140], XV [R.140], XIX [R. 143], XXI [R. 143], (erroneously designated in the Record as "XI"), XXIX [R. 147] and XXXVI [R. 150], upon which the judgment was based XXXV [R. 149]; in refusing to vacate its conclusions of law V [R. 152], VI [R. 152] and X [R. 153], upon which the

judgment was based; and in refusing to make the following findings and conclusions of law proposed by RFC, to-wit: RFC's proposed findings VIII [R. 1287], IX [R. 1290], X [R. 1292], XIV [R. 1292], XX [R. 1292] and XXIX [R. 1293], and RFC's proposed conclusion of law X [R. 1294].

(2) In ordering distribution of the award of \$194,500.00 on the basis of findings that the monies due to the claimants are due because of their respective interests in the Fletcher Lease alone.

(3) In refusing to order distribution in accordance with the jury's verdict that the award of \$194,500.00 for "H-1, W. I., the total working interest in Treasure Well No. 8," was for the lessee's interest in a common drill site comprised of both the Fletcher Lease and the Burns No. 1 Lease and in refusing to apportion the award to The Adamant Company, Walter B. Scoville and his assigns, on the basis of their respective participating interests in only three lots of the seven lots which were condemned.

(4) In holding that Harry Wynn is the owner of two separate $2\frac{1}{2}\%$ participating interests in the property for which the award stands by reason of certain assignments which were made or should have been made by Treasure Company to said Harry Wynn.

ARGUMENT.

I.

The Award of \$194,500.00 by the Jury in the Valuation Trial Was for "H-1, W. I., Being the Total Working Interest in Treasure Well No. 8" and This Award Stands for the Lessee's Interest in Both the Fletcher Lease and the Burns No. 1 Lease Which Together Comprise the Total Drill-Site for Treasure Well.

Judge Westover in the distribution proceeding was clearly in error in holding that the jury awarded the sum of \$194,500.00 for the lessee's interest in the Fletcher Lease alone. There is no evidence in the record of the valuation trial to support this conclusion and, on the contrary, the evidence is overwhelming that the award was made for the lessee's interest in both the Fletcher Lease and the Burns No. 1 Lease.

At no time during the valuation trial was there any dispute between the Government, as plaintiff, and the several co-defendants as to the area of the lease-hold for which damages were sought. The fact is there was an absolute unanimity of opinion that the area of the Treasure Well No. 8 drill-site comprised the two leases and the following considerations establish this conclusively:

(a) Witnesses for the Government testified that the leasehold for Treasure Well is made up of three lots comprising the Fletcher Lease and four lots comprising the Burns No. 1 Lease. There was no testimony offered by any of the co-defendants to refute this.

Thus the Government's principal witness, Dr. John F. Dodge, identified the seven lots making up

the leasehold as Lots 9, 10 and 11 of the "Fletcher Parcel" and Lots 7, 8, 35 and 36, which during the trial had been "labeled G-3" [R. 352-353]. He had previously testified that the Fletcher Lease was united with certain other lots by Treasure Company as a drill-site for Treasure Well [R. 306-308].

This testimony was corroborated by testimony of the Government's witness, Robert S. Burns [R. 719-720].

(b) The witness, Dodge, testified that under the law of California the minimum legal drill-site for an oil well was one acre [R. 350, 352] and no testimony was offered by the co-defendants to refute this. It was, instead, corroborated by statements which counsel for the co-defendants made to the court [R. 735, 738].

(c) Witnesses for both the Government and the co-defendants testified that the leasehold to be valued by the jury was approximately an acre in size and counsel for the co-defendants, in the presence of the jury, stated this to be a fact.

The witness, Dodge, referred to the area of the leasehold as "slightly under 50,000 square feet" [R. 352] and also described it as an acre [R. 306, 350].

The witness, Burns, stated that seven lots made up a drill-site for Treasure Well of an acre [R. 719-720].

The witness, Robin Willis, who testified for the co-defendants, was in accord [R. 650] and so was the defendant, Harry Wynn, who took the stand [R. 698].

Counsel for the co-defendants made various references to the “one acre” drill-site both in the presence of the jury [R. 579, 703] and during argument [R. 738].

An examination of the legal description in the Fletcher Lease [Adamant, Scoville, Wynn Ex. “F,” R. 1273; see R. 202] discloses that it covers approximately 20,025 square feet or less than half an acre. However, the area of the Burns No. 1 Lease [Adamant, Scoville, Wynn Ex. “G,” R. 1273] is about 25,785 square feet so that the total area of the combined leases is some 45,810 square feet or slightly more than an acre.

(d) The large colored map [Deft. Ex. “S,” R. 700; see R. 1276], introduced by the co-defendants as demonstrative evidence and exhibited to the jury was referred to by witnesses for both sides and the area on the map in purple color was identified by these witnesses as the one acre drill-site of Treasure Well comprising both the Fletcher Lease and the Burns No. 1 Lease.

The witness, Wynn, along this vein, testified that “The purple area consists of the one-acre drill-site on which Treasure Well is now located” [R. 698] and the court instructed the witness to take a pointer and outline the purple area on the map for the benefit of the jury.

On cross-examination the witness, Dodge, examined the map and admitted that the purple area represented the Treasure Well leasehold [R. 828].

(e) Documentary evidence containing the respective legal descriptions of the Fletcher Lease and of the

Burns Lease No. 1 was exhibited to a witness for the Government and also to a witness for the co-defendants and each witness testified that the two legal descriptions embraced the Treasure Well drill-site.

Defendant Johnson's Exhibit "A" for identification [R. 1273] was shown to the witness, Dodge. It contains four paragraphs of legal descriptions and he was asked on direct examination whether or not the first two smaller paragraphs alone relate to the acre upon which Treasure Well is drilled. The witness answered "Yes. That is correct, the first two. The first paragraph contains Lots 9, 10 and 11 and refers to the so-called Fletcher Parcel which has been labeled H.¹⁰ The next paragraph includes Lots 7, 8, 35 and 36 and refers to the four additional lots which I believe have been labeled G-3,¹¹ if I am not mistaken."

Defendant's Exhibit "K" [R. 1273] was shown to the witness Wynn. It contains legal descriptions in three separate paragraphs, the first being the description of both the Fletcher Lease and the Burns No. 1 Lease. The witness testified that "Parcel 1 includes the area for the Treasure Well; Parcels 2 and 3 cover the red and green" [R. 700].¹²

(f) Counsel for the co-defendants entered into a stipulation with counsel for the Government under the terms of which the expert witnesses for both sides

¹⁰"H" was a parcel designation for the Fletcher Lease on Plaintiff's Ex. 1 [R. 287].

¹¹"G-3" was a parcel designation for the lessor's interest in the Burns No. 1 Lease [R. 285-286].

¹²The witness was referring to Defendant's Exhibit "S," a map on which the Treasure Well leasehold was colored purple.

were required to reevaluate the leasehold estate of the Treasure Well drill-site on the basis of a total land-owners' royalty of 19.4% of which 7.365 was apportioned to the Fletcher Lease and 12.03% was apportioned to the Burns Lease No. 1 [R. 743-746]. This stipulation was made a ruling of the court [R. 746]. In the light of this ruling, it would have been not only meaningless but highly improper if the jury had been requested to render a verdict on the value of the lessee's interest in the Fletcher Lease alone.

(g) The verified pleadings filed by The Adamant Company, Walter B. Scoville and Harry Wynn, contain admissions by these co-defendants that the drill-site for Treasure Well is located on both the Fletcher Lease and the Burns No. 1 Lease and compensation for the seizure of both leasehold interests was accordingly demanded by them in such pleadings [R. 23, 55].

The joint answer filed by these parties on December 8, 1943 contains in paragraph V a clear statement that Treasure Well is located upon a drill-site composed of the two leaseholds [R. 16] and similar statements were contained in paragraph IV of their Petition for Partial Distribution of Compensation in Condemnation filed on March 15, 1944 [R. 26] and in paragraph IV of their subsequent Petition for Partial Distribution of Compensation in Condemnation filed on April 22, 1947 [R. 58].

It is submitted that the above considerations establish beyond all doubt that the area of the leasehold, the value of which was submitted to the jury, embraced the three

lots of the Fletcher Lease and the four lots of the Burns No. 1 Lease and that, on this score, there was no dispute whatever in the valuation trial.

Judge Westover in the distribution proceeding was clearly in error in finding that the symbol "H-1, W. I." as indicated on the map, Plaintiff's Exhibit 1, referred only to the three lots of the Fletcher Lease [Fdg. X, R. 139].

The three lots of the Fletcher Lease were designated on Plaintiff's Exhibit 1 as "Parcel H" [R. 287].

"H-1, W. I." was a symbol representing the "working interest" of the lessee in Treasure Well—the anticipated profit to the lessee to be derived in working the leasehold, taking into consideration the potential production, the estimated operating expenses and the burden of landowners' royalties [R. 307-310, 332-333, 343].

Obviously, the Government had not condemned as such the lessee's right to make a money profit from the operation of an oil well, nor had it condemned potential oil in place, in the sense that such oil was severable from the land. What the Government has condemned was land, including a leasehold interest in the land, and because it was considered both a feasible and pragmatic approach in the evaluation of the fair market value of the lessee's interest, expert witnesses for both sides testified as to the value of the "total working interest," taking into account the stipulated landowners' total royalties (on the seven lots) which the lessee would have had to pay had the property not been condemned.

"H-1, W. I." was therefore a symbol representing the total working interest of the lessee in the Fletcher Lease and the Burns No. 1 Lease and, as incorporated into the jury's verdict, it stands for the value which the jury placed upon the lessee's interest in both leases.

II.

The Adamant Company Is Entitled to No More Than 25% of 3/7 of the Net Balance of the Award and Walter B. Scoville and His Assigns Are Entitled to No More Than 19% of 3/7 of the Net Balance of the Award.

Judge Westover was correct in finding and concluding that the rights of The Adamant Company and of Walter B. Scoville under the agreement dated April 5, 1938 were merged into the Vickers' Judgment [Concl. IV, R. 151]; that the Vickers' Judgment was affirmed on appeal and has become final [Fdg. IV, R. 137]; that under the Vickers' Judgment The Adamant Company retained a 25% participating royalty interest in the Fletcher Lease alone and Walter B. Scoville retained a 19% participating royalty interest in the Fletcher Lease alone, neither The Adamant Company nor Walter B. Scoville having retained any interest whatever in the Burns Lease No. 1, nor in the Burns Leases No. 2 and No. 3 [Fdg. XXXIII, R. 149]; and that by reason of the doctrine of *res judicata* the interests of the claimants to the award in the distribution proceeding were established by the Vickers' Judgment [Concl. VIII, R. 152-153].

Thus, if Judge Westover had not erred in holding that the jury award in the valuation trial stands for the lessee's interest in the three lots of the Fletcher Lease alone, he would undoubtedly have applied the ruling of the Vickers' Judgment to an award for seven lots and would have ordered an apportionment in accordance with the request of RFC, as assignee.

If, as RFC contends, the net balance of the award stands for the lessee's interest in a total of seven lots

(which are of approximately equal size), it follows that the Vickers' Judgment entitles The Adamant Company to no more than 25% of that part of the award which represents the lessee's interest in the three lots of the Fletcher Lease or 25% of $\frac{3}{7}$ of the net balance of the award; and similarly it follows that the Vickers' Judgment entitles Walter B. Scoville and his assigns to no more than 19% of $\frac{3}{7}$ of the net balance of the award.

It should be noted that neither The Adamant Company nor Walter B. Scoville have designated as grounds for their appeal to this Court the findings and conclusions of Judge Westover on which he held that their rights to distribution of the award are defined by the Vicker's Judgment. Although at one point in the proceedings before Judge Westover counsel for these claimants attacked the Vickers' Judgment and argued that their rights under the agreement dated April 5, 1938 were not terminated nor merged into Vickers' Judgment [R. 160, 168], this tactic was, in effect, an effort to impeach their own evidence inasmuch as the findings of fact, conclusions of law and the judgment constituting the Vickers' Judgment were introduced at the Valuation Trial as "Adamant, Scoville, Wynn Exhibit E" with this statement by their counsel: "This is the complete findings and judgment in that case, *which defines the interests of The Adamant Company and Scoville*" [R. 449]. (Italics added.) In this connection, it should also be noted that the petition for distribution of the award filed by The Adamant Company, Walter B. Scoville and Harry Wynn [R. 79-95] not only recites the Vickers' Judgment as the basis of their respective claims but asserts that on May 20, 1942 the Vickers' Judgment became final.

III.

The District Court Should Not Have Preempted the Jurisdiction of the California State Court in Determining the Ownership Rights of Harry Wynn in the Property Condemned for Which the Condemnation Award Stands.

Judge Westover made a finding of fact as a result of the distribution hearing to the effect that there was presently an action pending in the Superior Court of the County of Los Angeles, Docket 486327, between Harry Wynn and Treasure Company and G. de Bretteville. In the same finding [Fdg. XXXVI, R. 150], Judge Westover was scrupulously careful to avoid making any decision as to the effect of the action in the California State Court or its merits, saying: "That the question of the merits of said action and the rights to bring same is immaterial to the issues in this case." Interestingly enough, Judge Westover had, by virtue of his conclusions of law, determined that Harry Wynn was entitled to 6% of the total award [See Concl. X, R. 153] and had expressly found that Harry Wynn's interest arose by assignment, and that a state court execution against any interest in Treasure Company which Harry Wynn might have was ineffective [Fdg. XI, R. 143]. Judge Westover concluded that the sale under execution of Harry Wynn's interest was ineffective [Concl. V, R. 152; See Concl. IV and VI, R. 151, 152].

Admittedly, in any condemnation case, where rival claims to a fund have been filed, a claimant is regarded as a plaintiff in respect to his own claim and as a defendant in respect to the claim of his rival or rivals. *United States v. Hoblitzell*, 2 Fed. Supp. 832 (D. Va. 1932). However, one of the fundamental principles

of the concurrent system of justice in the United States is that a comity will exist between the Federal and the State Courts. As stated by Mr. Justice Sutherland in *Kline v. Burke Construction Co.*, 260 U. S. 226, at page 229 (1922): "It is settled that where a Federal Court has first acquired jurisdiction of the subject-matter of a cause it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem* the effect is to draw to the Federal Court the possession or control, actual or potential of the *res*, and the exercise by the State Court of jurisdiction over the same *res* necessarily impairs and may defeat the jurisdiction of the Federal Court already attached. The converse of the rule is equally true, that where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction." See *Covell v. Heyman*, 111 U. S. 176 (1884); accord *Hagen v. Lucas*, 10 Pet. 400 (1836).

It has always seemed clear that jurisdiction already assumed and exercised under state law, by a State Court, is not subject to collateral attack in a Federal District Court. *General Exporting Co. v. Star Transfer Lines*, 136 F. 2d 329 (C. C. A. 6th, 1943). This was apparently the feeling which Judge Beaumont had during the valuation trial, as is shown by his comments [R. 752-753]. In fact, Judge Beaumont was of the opinion that the interest claimed by Wynn should be withdrawn from the condemnation proceeding until there had been a determination of his rights in the State Court [R. 850-851].

The foregoing rule has been frequently declared inapplicable to *in personam* proceedings, but even in such proceedings the matter of assuming jurisdiction is within the discretion of the Federal Courts. In a case under the Federal Declaratory Judgment Act, the Supreme Court in *Brillhart v. Excess Ins. Co.*, 316 U. S. 491 (1942), declared that the petitioner's motion to dismiss the bill for declaratory relief on an insurance question was addressed to the discretion of the court, even though there was no question but that the Federal Court would have jurisdiction of the matter, in spite of the previously filed State Court litigation. The now famous words were there uttered at page 495:

“Gratuitous interference with the orderly and comprehensive disposition of a State Court litigation should be avoided.

“Where a District Court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the State Court. This may entail inquiry into the scope of the pending State Court proceeding and the nature of the defenses open there. The Federal Court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.”

It should be observed that Judge Westover at the time of the distribution hearing made no investigation of the merits of the State Court proceeding involving Wynn, Treasure Company and G. de Bretteville. His reasoning, apparently was that these matters were entirely immaterial to a distribution of the award. This would seem unsound, for the rights of the parties entitled to the award were necessarily dependent upon a decision to be rendered by the State court. To supply this deficiency, Judge Westover in the same findings of fact in which he had already declared the position of the parties in the State Court proceeding immaterial, found validity and enforceability in the asserted rights of Harry Wynn.

Again, even though rights *in personam* are considered external to the above rule (and a will contest is probably an action *in personam*), in *United States v. 625.91 Acres of Land in Dunklin County, Mo.*, 49 Fed. Supp. 997. (E. D. Mo. 1943) in an eminent domain proceeding, District Judge Collet delayed the distribution of an award which had been made in the case before him until the outcome of the State Court will contest action. The court remarked in doing so (at page 1001):

“While this court may not be deprived of jurisdiction merely by reason of the pendency of the will contest action in the State Court, the State Court has the right to proceed with that litigation without interference from this court, and the very fact that a different conclusion concerning the validity of the will might be reached in this court from that reached in the State Court with resulting conflicting judg-

ments and decrees relating to that portion of the estate involved in this action is sufficient to compel in the interest of comity, an abstinence of the exercise of jurisdiction by this court for such a reasonable time as to permit the expeditious adjudication of the validity of the will by the State Court and a recognition by this court of the conclusion there reached.”

In the case at bar, we submit that Judge Westover might well have been under obligation to make an investigation and to exercise discretion of this character, for it would seem that an adjudication of a State Court on the rights of the respective parties would have been binding and material had the same been uttered prior to the ordered distribution of the subject award. In principle, there would seem to be no reason to differentiate in a case where the State Court had not reached its decision. It would appear most just to reserve from distribution the maximum sum for which Wynn has made claim until an ultimate decision has been reached by the California State Court inasmuch as it was Wynn, himself, who brought the State Court action for a determination.

Conclusion.

For the reasons set forth above, the judgment of Judge Westover should be reversed and the cause remanded to the District Court with instructions to make appropriate findings to the effect that the net balance of the award in the sum of \$191,800.00 covers the interest of the lessee in both the Fletcher Lease and the Burns No. 1 Lease and should be distributed as follows:

To the Adamant Company:

25% of $\frac{3}{7}$ of the net balance;

To Walter B. Scoville and his assigns:

19% of $\frac{3}{7}$ of the net balance;

To Reconstruction Finance Corporation, as assignee of Treasure Company:

The remainder of the net balance, subject to a possible charge for such amount as may be found to be payable to Harry Wynn by reason of a decision of the State Court in the pending action.

Respectfully submitted,

JOHN H. RICE AND

JULIUS A. LEETHAM,

Attorneys for Reconstruction Finance Corporation.

No. 12961.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLÉ,
HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
HAYWARD and MARY S. HAYWARD; RECONSTRUCTION FI-
NANCE CORPORATION, as Assignee of Treasure Company;

Appellees.

UNITED STATES OF AMERICA for the Use of RECONSTRUCTION
FINANCE CORPORATION, a Federal Corporation, Acting in Behalf
of DEFENSE PLANT CORPORATION, a Federal Corporation,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLÉ,
HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
HAYWARD and MARY S. HAYWARD,

Appellees.

(Continued on Inside Cover.)

Appellants' Adamant Company, Walter B. Scoville,
Joe Seeple and Harry Wynn, Opening Brief.

LELAND J. ALLEN,
411 West Fifth Street,
Los Angeles 13, California,

Attorney for Appellants, The Adamant Company,
Walter B. Scoville, Joe Seeple and Harry
Wynn.

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RECONSTRUCTION FINANCE CORPORATION, Solely as Assignee
of Treasure Company,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPL
and HARRY WYNN; HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD and MARY S. HAYWARD, and UNITED STATES
OF AMERICA,

Appellees.

THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE,
JOE SEEPL and HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE
CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
HAYWARD and MARY S. HAYWARD,

Appellees.

HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and
MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPL
and HARRY WYNN; UNITED STATES OF AMERICA and RE-
CONSTRUCTION FINANCE CORPORATION,

Appellees.

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No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE,
HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
HAYWARD and MARY S. HAYWARD; RECONSTRUCTION FI-
NANCE CORPORATION, as Assignee of Treasure Company,

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J. C. HAYWARD and MARY S. HAYWARD, and UNITED STATES
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Appellees.

THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE,
JOE SEEPLE and HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE
CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
HAYWARD and MARY S. HAYWARD,

Appellees.

HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and
MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; UNITED STATES OF AMERICA and RE-
CONSTRUCTION FINANCE CORPORATION,

Appellees.

**Appellants' Adamant Company, Walter B. Scoville,
Joe Seeples and Harry Wynn, Opening Brief.**

Points on Appeal.

This is an appeal by the Adamant Company, Walter B. Scoville, Joe Seeples and Harry Wynn from certain portions of the Findings and Judgment in the above entitled case.

This brief maintains that the trial court failed to allocate the funds of the jury award in the correct and proper proportion, to these appellants and other claimants.

This brief maintains that these appellants had an equitable lien against any sums of money allocated by the trial court to the Treasure Company or its belated assignee, the Reconstruction Finance Corporation.

Jurisdiction.

An act of Congress, approved January 22, 1932 (U. S. C. 601-617 as amended), and Public Law 507, 77th Congress, approved March 27, 1942, and Executive Order 9217 issued by the President of the United States on August 7, 1942, by virtue of and pursuant to authority vested in him by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (Public Law 507, 77th Congress), which Acts and Executive Order author-

ize the Reconstruction Finance Corporation to acquire by condemnation property deemed necessary for military, naval or other war purposes.

The United States Attorney for the Southern District of California filed a Complaint in Condemnation in the United States District Court for the Southern District of California, Central Division, before the Honorable Campbell E. Beaumont, United States District Judge, on September 28, 1942. [R.* p. 3.]

The Adamant Company, Walter B. Scoville and Harry Wynn filed an answer to said Complaint in Condemnation on December 8, 1943 [R. p. 14], in which answer the Adamant Company alleged its ownership of a 25 per cent participating royalty interest in certain leaseholds being condemned, and *also alleged* that it had acquired a further interest in the leaseholds amounting to 25 per cent of the production of \$205,411.68, being the value of oil and gas produced by Treasure Company, whose interests were being condemned. [R. p. 19.]

And in which answer Walter B. Scoville alleged his ownership of a 17 per cent participating royalty interest in certain leaseholds being condemned, and *also alleged* that he had acquired a further interest in the leaseholds amounting to 17 per cent of the production of \$205,411.68, being the value of oil and gas produced by the Treasure Company, whose interests were being condemned. [R. pp. 20-22.]

And in which answer Harry Wynn alleged his ownership of a 6 per cent participating royalty interest in cer-

*The references preceded by "R" are to the printed record on appeal herein.

tain leaseholds being condemned, and *also alleged* that he had acquired a further interest in the leaseholds amounting to 6 per cent of the production of \$205,411.68, being the value of oil and gas produced by the Treasure Company whose interests were being condemned. [R. pp. 22-23.]

The jury trial was heard on April 19, 20, 21, 22, 27, 28, 29 and May 4, 5, 6, 9, 10, 11, 12 and 13, 1949 and a judgment upon the verdict of the jury was entered July 13, 1949.

Section 258a of 40 U. S. Code Anno., provides in part:

“* * * and the right to just compensation for the same shall vest in the persons entitled thereto, and said compensation shall be ascertained and awarded in said proceedings and established by judgment therein, * * *,”

and pursuant to said section the Adamant Company, Walter B. Scoville and Harry Wynn petitioned for distribution to them of the respective amounts due them in the condemnation award made by the jury, said petition was filed in the District Court on February 3, 1950. [R. p. 79.]

On February 11, 1950, Joe Seepie filed his petition for distribution of compensation for the amount due him and pursuant to said Statute, 40 U. S. Code Anno. 258a. [R. p. 96.]

That the United States Government, Reconstruction Finance Corporation, Treasure Company, Mr. and Mrs. Bullen and Mr. and Mrs. Hayward did not file any petition for distribution of compensation in the condemnation award made by the jury.

A trial was had before the Honorable Harry C. Westover, Judge Presiding, sitting without a jury, on May

10, 11, 12 and 16, 1950, for the determination and the allocation of the fund of \$194,500.00, being the award by the jury in the foregoing condemnation action and designated by the jury as the value of "the total working interests in Treasure Company Well, Treasure No. 8."

Findings of Fact and Conclusions of Law and Judgment were signed by the Honorable Harry C. Westover, and Judgment entered October 30, 1950, in Book 68, page 720 of Judgments of the District Court.

Notice of Intention to Move for a New Trial by Bullen and wife, and Hayward and wife was filed November 8, 1950. [R. p. 156.]

Notice and Motion for New Trial was filed by The Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn (these appellants), November 9, 1950. [R. p. 158.]

Motion to Set Aside Findings of Fact and Conclusions of Law and Judgment and for a New Hearing was filed by the Reconstruction Finance Corporation November 9, 1950. [R. p. 168.]

Motion to Vacate and Set Aside Findings and Judgment was filed by the United States of America on November 13, 1950. [R. p. 174.]

All of the above motions were denied December 11, 1950.

Notices of Appeal were filed by the plaintiff, the United States of America, on January 3, 1951, and on January 8, 1951. [R. pp. 185, 187.]

Notice of Appeal was filed by these appellants, The Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn, on January 9, 1951. [R. p. 189.]

Notice of Appeal was filed by Reconstruction Finance Corporation on January 10, 1951. [R. p. 188.]

Notice of Appeal was filed by Bullen and wife and Hayward and wife on January 17, 1951. [R. p. 190.]

The jurisdiction of this Court to review the judgment of the District Court is conferred by the provisions of 28 United States Code Annotated, Section 1291.

Statutes Involved.

United States Code Annotated, Title 40.

Section 257. Condemnation of realty for sites and other uses; jurisdiction.

In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice. Aug. 1, 1888, c. 728, Sec. 1, 25 Stat. 357; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

Section 258. Same; Procedure.

The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding. Aug. 1, 1888, c. 728, Sec. 2, 25 Stat. 357; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

Section 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure.

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421.

United States Code Annotated—Title 28.

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Questions Presented by This Appeal.

1. Whether the judgment of the District Court in dividing the jury award of \$194,500.00 into 100 parts instead of into 80.6 parts is contrary to the law and the evidence.

2. Whether the District Court erred in holding that these appellants, The Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn, did not have an equitable lien against all moneys allocated from the jury award to the Treasure Company, or its belated assignee, the Reconstruction Finance Corporation.

Statement of the Case.

The Adamant Company established an ownership of 25 per cent participating royalty interests in several leaseholds that were condemned, *and* 25 per cent participating royalty interests in the *gross* production of Treasure Well No. 8, situate upon one of the leaseholds, which interest in gross production under California law becomes an interest in the land.

Walter B. Scoville established an ownership of 17 per cent participating royalty interests in several leaseholds that were condemned, *and* 17 per cent participating royalty interests in the *gross* production of Treasure Well No. 8, situate upon one of the leaseholds, which interest in gross production under California law becomes an interest in the land.

The interests of Adamant Company and Walter B. Scoville were established by a certain contract dated April 5, 1938, between Treasure Company, the Adamant Company and Walter B. Scoville, pertaining to said leaseholds and by certain written assignments executed by Treasure Company to each of them.

Said parties further established their interests of 25 per cent and 17 per cent respectively by reason of a certain judgment rendered in the Superior Court of the State of California in and for the County of Los Angeles on or about the 27th day of November, 1940, which adjudged in part as follows:

“* * * The Adamant Company and Walter B. Scoville, and their assigns, are entitled to retain their respective interests in said lease hereinbefore described, upon which said Well, ‘Treasure No. 8’ is

drilled, to-wit: 25 per cent therein to the Adamant Company, a corporation, and 19 per cent therein to Walter B. Scoville, both of which interests are subject to any assignments made, and subject to their pro rata share of the completion, operation and maintenance costs and charges of said well." [Jury Trial Ex. E, R. p. 449.]

That Harry Wynn established his ownership of 6 per cent participating royalty interest in certain of the leaseholds being condemned by reason of assignments to him of such per cents by the Treasure Company, as set forth in the written documents [Exhibits H, I, J, K, L, R. pp. 449-450], *and* a 6 per cent participating royalty interest in the *gross* production of Treasure Well No. 8 situate upon one of the leaseholds which interest in *gross* production under California law becomes an interest in the land.

The evidence, by stipulation, before the jury established that there were 80.6 per cent working interests in Treasure Well No. 8, and that there were 19.4 per cent land-owners' interests in Treasure Well No. 8. [R. p. 746.]

The *form* of the jury verdict was prepared by *the Government*, the plaintiff herein, and so far as the working interests in Treasure Well No. 8 are concerned the jury's verdict read as follows:

"H-1. W-I, being the total working interests in Treasure Well, Treasure No. 8 . . . \$194,500.00."
[R. p. 71.]

The evidence before the jury was that Treasure Well No. 8 from the time it had been placed upon production until it was seized by the plaintiff in this condemnation action had produced petroleum products which had sold

for over \$205,000.00. [Jury Trial Rep. Tr. p. 778, lines 14-19; R. p. 697.]

By stipulation before the Honorable Harry C. Westover at the hearing on the question of the allocation of the funds awarded by the jury, it was stipulated that Treasure Well No. 8 had produced petroleum products during the time it was placed on production until it was seized by the Government in an amount that sold for \$205,411.68, and that Treasure Company had handled these funds. [R. p. 1235.] No part of said income was paid to the Adamant Company, Walter B. Scoville, Joe Seepie or Harry Wynn, except the sum of \$88.54 paid to Harry Wynn in April of 1939.

This appeal followed to have the issues determined in this Court.

Specification of Errors.

I.

These appellants maintain that since the jury award of \$194,500.00 was for only 80.6 working interests, that the District Court should have divided the award into 80.6 parts and distributed twenty-five times that amount to the Adamant Company; sixteen times that amount to Walter B. Scoville (or Joe Seepie) and six times that amount to Harry Wynn.

The District Court erred in dividing the jury award into 100 parts, and thereby *decreased our* holdings by approximately 20 per cent.

II.

Our second Specification of Error is that the District Court erred in not granting these appellants an equitable lien against funds from the jury award which were to be distributed to Treasure Company, or its belated assignee the Reconstruction Finance Corporation.

In 1943, and *before* the Reconstruction Finance Corporation had taken, by written assignment [see Adamant, *et al.*, Exhibit 1—Feb. 23, 1950], the interests of Treasure Company in the leaseholds and in the subsequent condemnation award, the Adamant Company, Walter B. Scoville and Harry Wynn filed their answer in the case at bar and alleged a lien against the leasehold and moneys to be allocated to the Treasure Company because of the fact that the Treasure Company, during the time of producing the oil well had *failed to pay to* these holders of participating royalty interests any portion of the income from the production of said well, and that said Treasure Company and its President, Mr. de Bretteville, had handled all of the funds derived from the production of the well.

Under the California laws a recipient of oil royalties has an interest in the land so long as his right to royalty continues.

ARGUMENT.

The appellants, Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn were gratified with the manner and dispatch exhibited by the Honorable Harry C. Westover in his conduct of the hearing pertaining to the allocation of the funds of \$194,500.00, which was the amount of the jury award for the “working interests of eighty and six-tenths (80.6%)” in Treasure Well No. 8.

We contend that on two matters only Judge Westover is in error and we believe this Honorable Court of Appeals can correct those errors without the necessity of a new trial.

The Judge was thinking of the proper allocation among the litigants of the jury award of \$194,500.00, *verdict value* of the total working interests of 80 and 6/10ths units in this well.

His error in that regard was in his statement, “What difference does it make if you divide it (\$194,500.00) into 100 parts or 80.6 parts?”

The difference is that such a division into 100 parts decreases the award belonging to Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn by 20 per cent, which is contrary to the verdict of the jury.

This error is discussed under Point I hereinafter.

* * * * *

We believe Judge Westover considered the question of our equitable lien upon the funds from this jury award which belonged or was to be allocated to Treasure Com-

pany (or its belated assignee Reconstruction Finance Corporation) as strictly a legal matter, which it might be well to pass to this Circuit Court of Appeals for decision.

Our interest of 47 per cent ownership of total production of the well was established by documentary evidence.

The total production of the well prior to seizure was *stipulated* by all parties to be \$205,411.68.

The answer filed by these claimants pleaded their right to an equitable lien both in percentages and in sums of money and alleged the production figure of \$205,411.68.

The Reconstruction Finance Corporation's own expert witnesses testified to the cost of the operation of the well—which costs we conceded should be deducted from the gross production as operating expenses chargeable against the total working interests.

There is clearly a right in these claimants to an equitable lien upon any funds to be allocated to the former lessee and operator, the Treasure Company or its belated assignee, Reconstruction Finance Corporation.

This question is discussed under Point II hereinafter.

POINT I.

MATHEMATICAL ERROR OF TRIAL COURT.

The Jury's Award Was Based Upon Eighty and Six-Tenths—One Per Cent Working Interests of the Leasehold Upon Which Treasure Well Was Drilled Because There Were Only Eighty and Six-Tenths—One Per Cent "Working Interests" in Treasure Well No. 8.

In view of the fact that there was a total of only eighty and six-tenths (80.6)—one per cent "working interests" in Treasure Well No. 8, the award of \$194,500.00 should be *divided* into eighty and six-tenths sums of money and allocated to the owners of said one per cents in accordance with the number of one per cents owned by each claimant.

The Trial Court Erred in Dividing the Jury Award Into 100 Parts Instead of Into 80 and 6/10 Parts or Units.

The exact wording of the jury's verdict and award pertaining to Treasure No. 8 leasehold was, as follows:

"H-1

W-I being the total working interests	
in Treasure Company Well	
Treasure No. 8	\$194,500.00"

[R. p. 65.]

The evidence before the jury, by stipulation, established the fact that "the total working interests in Treasure Company Treasure Well No. 8" was only 80 and 6/10 interests, units or parts and *not* one hundred interests, units or parts. [R. p. 746.]

The landowners' interests were fixed also by stipulation at 19 and 4/10ths parts, or units or interests. [R. p. 746.]

The question of the valuation of the said landowners' interests was *withdrawn* from the jury *before the verdict was rendered*.

Since 100 per cent represents the total leasehold or the total production, and the landowners' portion of 19 and 4/10 per cent of said total valuation of the production and of the leasehold was *withdrawn* from the consideration of the jury, it is *clearly erroneous to hold that the jury's verdict covered 100 per cent valuation of the leasehold*.

It is also error for the trial court to hold that working interests of eighty and 6/10 constituted the *total* leasehold.

Since Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn were the combined owners of 47 working interests out of the total of 80 and 6/10 working

47
interests hence they are entitled to — of \$194,500.00, or
80.6
\$113,418.05.

* * * * *

The jury award of \$194,500.00 divided by 80 and 6/10 equals \$2,413.15 which is the value of *one* working interest.

(The lessee of an oil lease never owns 100 per cent of the leasehold because his 100 per cent is *diminished* by the percentages *retained* by the landowner. This appears self evident.)

IT IS ERROR TO FORCE AN OWNER OF A 1 PER CENT WORKING INTEREST, OUT OF A TOTAL OF 80.6 PER CENT WORKING INTERESTS, TO ACCEPT ONE ONE-HUNDREDTHS OF THE JURY AWARD INSTEAD OF ONE ONE-EIGHTIETH AND SIX-TENTHS PER CENT OF THE JURY AWARD.

We do not believe our opponents dispute the above figures of eighty and six-tenths (80.6) lessee's interest and nineteen and four-tenths (19.4) landowners' interest, making a total of 100 per cent, which constitutes the full leasehold.

Furthermore the jury award speaks for itself and states "total working interests." It does *not* state total *landowners and* working interests combined.

Nor does the jury award state total leasehold interests.

The Trial Court Found as Follows:

"XIV.

The jury's verdict of \$194,500.00 established the value of the *lessee's* interest in the Fletcher Lease, Lots 9, 10 and 11, Block 33, Tract 9809, under which Treasure Well No. 8 was located." (Emphasis added.) [R. p. 140.]

This Finding is conclusive to the effect that only "the lessee's interest" was covered by the jury's award.

The lessee's interest was only 80.6 per cent of the leasehold.

Since the jury award was not based on a 100 per cent leasehold interest and value but only upon 80.6 per cent of the leasehold the following Finding XIX is *incorrect*:

"XIX—The Adamant Company is entitled to 25 per cent of the jury award, which sum stands in place of the leasehold." [R. p. 143.]

This said Finding should be corrected to read as follows:

25

“The Adamant Company is entitled to — per
80.6
cent of the jury award.”

Conclusion X [R. p. 153] must be changed to comply with these corrected figures and, of course, Paragraph II of the Judgment [R. p. 155] must be changed accordingly.

The Government Expert Witnesses Parcelled the Leasehold Into “Working Interests” and “Landowners Interests” and Opined Two Separate and Unrelated Valuations Before the Jury.

John H. Dodge, the principal expert witness used by the Government in placing the value on Treasure Well No. 8 testified as follows:

“Q. Mr. Weymann: Can you give us what, in your opinion, is the *total working interest—value* of the working interest in the Treasure No. 8 Well?
A. The total working interest in the Treasure Well No. 8 under conditions of *total royalty* as disclosed by the title search, is \$150,830.00. That title search discloses the well *as subject* to a total of 28.7 per cent royalty, and the value which I have given for the working interest is *predicated* upon *that* royalty *being paid.*” [R. pp. 306-307.]

(Later in the trial *when* it was stipulated that the landowners royalty wasn't 28.7 per cent but was really 19.4 per cent this witness raised his appraisal of the value of the “working interests” to \$176,314.00.)

Dr. Dodge testified further:

“Q. Mr. Weymann: When you say the working interests, you include *all* interests in that well *excluding* only the basic landowners royalty and overriding royalties? A. Well, I would say excluding only the 2 landowners royalties—the one to Fletcher and the one to the Herndon Community Lease west of Fabmouth.” [R. pp. 307-308.]

Dr. Dodge further testified:

“Q. Mr. Weymann: I mean the working interest of the total production amounts to how much? A. Well, it amounts to the *difference* between 100 per cent and 28.7 per cent, or 71.3 per cent of the production.” [R. pp. 309-310.]

(As heretofore stated, by stipulation, the above per cents were changed to 80.6 working interests and 19.4 landowners interest.) [R. p. 746.]

To eliminate any further doubt that the jury's award of \$194,500.00 covered *only 80.6 per cent of the leasehold* (and of its total production) we call this Court's attention to the fact that the Government's witness, Dr. Dodge, placed a *separate* valuation upon 12.03 per cent of the *production of the well* which belonged to one of the landowners.

Dr. Dodge testified as follows:

“Q. Mr. Weymann: That landowners royalty to which you have testified, does that go to the whole of G, or *only to the 4 lots in G*? A. The 12.03 per cent accrues to the *whole of G*. In other words, it is a royalty paid to the Community Lease G, *all of the lots* West of Falmouth. It, of course, *excludes Mr. Fletcher's lots* because he was not a member of the Community Lease.

The Court: And that landowners interest of G, you value at \$40,340.00? A. That forms the major part of the \$40,340.00 value." [R. p. 310.]

* * * * *

In fact, the Government directed the following instruction at the jury trial, which was given by the Court:

"You are instructed that your verdict as to the parcel designated as 'Parcel H-1. W-I' must be predicated on the assumption that the royalty payable from the production of Treasure Well No. 8 is 19.4 per cent and not 28.7 per cent." (Leaving working interest of 80.6 per cent.)

These appellants submit that the jury award of \$194,500.00 for the value of the "working interests" could not properly be 100 per cent of the leasehold and hence divided into 100 units as the trial court *erroneously* ruled. The jury award covered only 80.6 per cent of the leasehold and hence the \$194,500.00 must be divided into 80.6 units.

The Jury Trial Judge (Not Judge Westover) Informed the Jury That the Government Experts Were Not Placing a Valuation on the 100 Per Cent or the Total Value of Treasure Well but Only Upon the "Working Interest" Portion of the Well.

J. O. SEEPLÉ

called as a witness on behalf of Defendants The Adamant Company, Walter B. Scoville, and Harry Wynn, being first sworn, was examined and testified as follows * * * [R. p. 451]:

"Q. Have you formed an opinion as to the market value of Treasure Well No. 8 as of September 28th, 1942? A. Yes, I have.

Q. And in your opinion, what is the valuation of Treasure Well No. 8, as of that date? A. From one million to two million dollars.

Q. And you base that on what you have testified to as well as potential production? A. Yes.

Mr. Allen: I think that is all at this time until he marks on the map what he has in mind.

The Court: What does Mr. Seeples have in mind as the basis for his valuation? When Mr. Dodge and Mr. Stolz were on the stand they testified as to a *working interest*. Is that what you have in mind?

Mr. Allen: No, the total 100 per cent value of Treasurer Well No. 8, your Honor.

The Court: *That being different from the other valuations, don't you think that should be given another number if the jury are to use that for valuation purposes?*

I just call that to your attention, Mr. Allen. We have to keep these things so the jury will understand them.

Mr. Allen: Yes, I think that should be designated separately.

The Court: How many parcels are you going to deal with?

Mr. Allen: Two.

The Court: Then suppose we letter them Y and Z.

Mr. Allen: That is satisfactory.

The Court: Very well. We will call it Parcel Y which represents the *total value* of Treasure Well.

Mr. Allen: That is right, your Honor. (512.)"
]R. pp. 465-466.]

To Further Emphasize the Mathematical Error of the Trial Court in Its Allocation, We Submit the Following Facts:

The contract of April 5, 1938, which set up the working interests of the parties in Treasure Well No. 8 contained the following provision:

“It is understood that after providing for land-owner and overriding royalties, the issuance of the participating royalties above set forth, and certain other minor issues, which will be requested in said application for permit, first party (*Treasure Company* which the reconstruction Finance Corporation claims as its assignor), will have remaining *approximately 25 per cent* of any production which may be obtained from the above leases.” [Ex. “D,” Jury Trial, Rep. Tr. p. 492; R. p. 449.]

Under this mathematical error in the *allocation* judgment the Reconstruction Finance Corporation would wrongfully receive 51 per cent *instead* of approximately 25 per cent. *Clearly erroneous!*

It is undisputed that at the time the Government seized possession of this well, on September 28, 1942, the

Adamant Company was

the owner of	25	working interests
Walter B. Scoville	16	working interests
Harry Wynn	6	working interests
Bullen & Hayward	2	working interests
Johnson	2½	working interests
Bodkin	1	working interests
Treasure Co.	26.1	working interests

Total 80.6 working interests

The Jury's award of \$194,500.00 for eighty and six-tenths working interests amounts to \$2,413.15 valuation of *one* working interest, then

The Adamant Company is entitled to	
25 times \$2,413.15 or.....	\$60,328.75
Walter B. Scoville is entitled to	
16 times \$2,413.15 or.....	\$38,610.40
Harry Wynn is entitles to 6 times	
\$2,413.15 or.....	\$14,478.90

We submit that Finding XIX, which states that: "The Adamant Company is entitled to 25 per cent of *the Jury award*, which stands in place of the leasehold" [R. p. 143] is a mathematical *error*, as the jury award covered only 80.6 per cent of the leasehold. The Adamant Company is entitled to 25 per cent of 100 per cent *total production* or *total leasehold* and *not* 25 per cent of 80.6 per cent of *production* (or 80.6 per cent of *leasehold*).

In other words the Adamant Company is entitled to
25
—— of the jury award.
80.6

* * * * *

Finding XVI *correctly* quotes that the

"assignment of participating royalty interests in the leases to the Adamant Company convey to the Adamant Company twenty-five (25) one per cent participating royalty interests in *all* oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises." (Emphasis added.) [R. pp. 140-141.]

(The same language is used in the same Finding pertaining to the interests conveyed to Walter B. Scoville and also to Harry Wynn, designating their *respective percentage* interests in “*all oil, gas, etc.*”

Let us take the following example:

The well yields 100 barrels of oil. Under Finding XVI above, the Adamant Company would be entitled to 25 barrels of oil, being twenty-five (25) per cent of “*all oil.*”

When the Trial Court arbitrarily placed the value of the “working interest” *portion* of the leasehold at *one hundred* (100) *per cent* and failed to *first deduct* the nineteen and four-tenths (19.4) per cent of the land-owners interest, but simply held that the jury’s award covered one hundred (100) per cent, the Adamant Company received twenty-five (25) per cent of the jury award, instead of 25 per cent of total production, or, in other words, the Adamant Company only receives twenty (20) barrels of oil on a one hundred (100) barrel production, and *hence is deprived of 5 barrels out of every 100 barrel production.*

There appears to have been a little quirk in the thinking and figures of the Trial Court, as during the course of the hearing the Trial Judge asked: “what difference does it make if we take one hundred (100) per cent or eighty (80) per cent?”

The *difference is*, of course, that it takes from the Adamant Company, Scoville and Wynn approximately one-fifth ($1/5$) of their interests and hands it to the Treasure Company, or rather, the Reconstruction Finance Corporation, its belated assignee. Treasure Company never owned more than 26.1 per cent of production.

The Trial Court *correctly* found in Finding XVIII (in part) as follows:

“ * * * Under the contract dated April 5, 1938, and the decision in the case of Scoville v. de Bretteville, both of which as herein referred to, the Adamant Company received a twenty-five (25) per cent participating royalty interest in the *Fletcher lease*, and Walter B. Scoville received a nineteen (19) per cent participating royalty interest in the Fletcher Lease. * * *” [R. p. 142.]

The Finding clearly shows that the Adamant Company had twenty-five (25) barrels out of every one hundred (100) barrels produced on the leasehold, and that Walter B. Scoville had nineteen (19) barrels out of every one hundred (100) barrels produced.

Since the jury award was a valuation of only eighty (80) barrels (80.6 per cent of production) it is incorrect for the Trial Court to set over to the Adamant Company the valuation of twenty (20) barrels and to Walter B. Scoville the valuation of fifteen and 2/10 barrels. Scoville's 19 per cent later reduced to 16 per cent by assignments of 3 per cent.)

We submit that paragraph X of the Judgment [R. p. 153] should be changed in the following particulars:

Adamant Company is entitled to	\$60,328.75
(and not \$47,925.00 as adjudged)	
Walter B. Scoville is entitled to	\$38,610.40
(and not \$30,672.00 as adjudged)	
Harry Wynn is entitled to	\$14,478.90
(and not \$11,502.00 as adjudged)	

This corrected computation divides the jury award which reads as follows:

“H-1

W-I Being the total working interests in
Treasure Company Well No. 8 \$194,500.00”

among the “total working interests of eighty working interests and six-tenths, and *not* among “100 working interests” which *latter never existed*.

* * * * *

All oil leases are owned in at least 2 separate and distinct portions—the lessor’s portion of the lease and the lessee’s portion of the lease.

In the case at bar the jury’s verdict covered *only* the lessee’s portion which consisted of 80 and 6/10 working interests.

Conclusion on Point I.

Since the Government expert witnesses testified to the value of the working interest portion of the oil well—since the jury trial judge informed the jury that the Government expert witnesses were not placing a valuation upon the total value or 100 per cent value of Treasure Well—and since the verdict of the jury reads “total working interests in Treasure Well” then the jury award must be divided into 80 and 6/10 working interests or parts and not into 100 parts for the purpose of distribution.

POINT II.

EQUITABLE LIEN ERRONEOUSLY DENIED.

Any and All Sums of Money Allocated to the Reconstruction Finance Corporation as Assignee of Treasure Company Are Subject to an Equitable Lien for All Moneys Which Treasure Company Should Have Paid in Equity and Good Conscience to the Adamant Company, Walter B. Scoville and Harry Wynn, From the Moneys Received by the Treasure Company From the Sale of Oil, Gas and Other Hydrocarbon Substances From Treasure Well No. 8 Up to the Time of the Seizure of the Well by the Government Under This Condemnation Action.

In the appeal in the case at bar we find according to the title that the United States of America is appealing “for the use of Reconstruction Finance Corporation, a Federal corporation.”

We also find in its Notice of Appeal that the Reconstruction Finance Corporation is appealing “solely as assignee of the Treasure Company, party-claimant in the above entitled action, * * *”

Since the Reconstruction Finance Corporation’s appeal is in two capacities, we are interested at this point of our argument in its capacity *as assignee* of Treasure Company’s interest.

The Findings in the case at bar in its preamble contains the following: “and Reconstruction Finance Corporation appearing *solely as assignee* of Treasure Company’s interest in the foregoing award by its attorneys, John H. Rice and Julius A. Leetham;” [R. p. 135.]

From the time that Treasure Well was placed on production until the Government took possession of said well, on September 28, 1942, the Treasure Company sold the products of said well and received therefor the sum of \$205,411.69. (See stipulation before Trial Court. [R. pp. 1235-1236.])

Even though the Adamant Company, Walter B. Scoville and Harry Wynn owned their respective interests in this production, Treasure Company paid them nothing from the production with the exception of \$88.54, paid to Harry Wynn in April, 1939.

Both of the Government witnesses in the case at bar testified to the fact that the cost of the operation of this well should not exceed more than \$3.30 a per cent per month.

Harry P. Stolz, a Government expert witness, testified as follows: “* * * and as I previously testified, I used an operating cost of \$3,200.00 per year per well.” [Jury trial, R. p. 389.]

(Said \$3,200.00 amounts to \$3.30 per one per cent per month.)

Dr. John F. Dodge, a Government expert witness, testified as follows:

“However, that became of no importance since the operating charges which we, I should say I—Mr. Sheldon and I, in making this appraisal, assumed to be the operating cost in the future, were below a \$10.00 per per cent per month, which created a difference, or at least one of the differences between these various classes of per cents. Our operating costs which we postulated in making our estimate of the future value of this property were *very much less*

than \$10.00 per month per cent, which was the breaking line between at least certain classes of these working interests of which you speak. * * * *and is not governed or influenced by any possibly inflated idea of costs that might have been existing in the past.*" [Jury trial, R. pp. 336-337.]

Dr. Dodge, Witness, testified further:

"Q. By the way, we never did ask you the exact figure that you allowed for cost per well per year?
A. \$3,200 per operating well-year.

Q. The same as Mr. Stolz? A. The same as Mr. Stolz." [Jury trial, R. p. 815.]

These appellants submit that since their total interest in this leasehold amounts to 25 per cent, plus 16 per cent, plus 6 per cent, or a total of 47 per cent, that they are entitled to 47 per cent of \$205,411.69, or a total sum of \$96,543.49, less the cost of operation of the well and less the sum of \$88.54 paid to Harry Wynn in April, 1939.

This claim of \$96,543.49 (less operating expense) becomes a lien upon any portion of the jury award that is claimed by the Treasure Company or its belated assignee, the Reconstruction Finance Corporation.

"When title to the land vests in the condemnor the lien of the mortgage is transferred to the award."

United States v. Certain Lands, etc., 129 F. 2d 557 (1942) (C. C. A. 2).

"In New York inchoate interests are not destroyed by condemnation but merely transferred to the award: witness dower."

United States v. Lands in Hempstead, etc., 129 F. 2d 918, 919, 920 (C. C. A. 2) (1942).

(In California community property interests takes the place of dower.)

The Treasure Company is forbidden, having failed to remit the earnings of this joint adventure to the royalty holders (less the cost of operation)—to now come into the condemnation action and receive its portion of the jury award *free and clear* of the claims of the royalty holders.

No court of equity should permit such an inequitable act.

The Treasure Company would thus be taking advantage of its own wrong in failing to pay to the other joint adventurers their profits derived from the operation of the well.

“(3) *A party to a contract cannot take advantage of his own act or omission to escape liability thereon.* (17 C. J. S., Sec. 468, p. 966; 12 *Am. Jur.*, Sec. 381, p. 957.) Where a party to a contract prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his *liability*. (*Bewick v. Mecham*, 26 Cal. 2d 92, 99 (156 P. 2d 757, 157 A. L. R. 1277); *Pacific Venture Corp. v. Huey*, 15 Cal. 2d 711, 717 (104 P. 2d 641); *Crane v. East Side Canal etc. Co.*, 6 Cal. App. 2d 361, 367 (44 P. 2d 455); *Carl v. Eade*, 81 Cal. App. 356, 358 (253 P. 750);”

Paul Overton v. The Vita-Food Corporation, a corporation, 94 Cal. App. 2d 367-371, 210 P. 2d 757 (Oct., 1949).

“(6b) *By making the appraisal impossible*, defendant prevented the determination of the purchase price by the method contemplated by the contract. Defen-

dant's obvious purpose was to make the contract inoperative and to prevent plaintiff from seeking specific performance after the price was determined by the appraisers. (8) *A party who prevents fulfillment of a condition of his own obligation commits a breach of contract* (Alderson v. Houston, 154 Cal. 1, 13 (96 P. 884); Pacific Venture Corp. v. Huey, 15 Cal. 2d 711, 717 (104 P. 2d 641); Carl v. Eade, 81 Cal. App. 356, 358 (253 P. 750); Rest., Contracts, §315) *and cannot rely on such condition to defeat his liability.* (Pacific Venture Corp. v. Huey, *supra*; Carl v. Eade, *supra*; 13 C. J. 647; 17 C. J. S. 966; 12 Am. Jur. 885.)”

Bewick v. Mecham (1945), 26 Cal. 2d 92, 156 P. 2d 757; 157 A. L. R. 1277.

Equitable principles require that any moneys due to the Treasure Company and Mr. de Bretteville, its president and manager, should be applied upon this equitable lien by reason of their misconduct and failure to pay to these appellants their just proportion of the income from this producing well.

To permit the Reconstruction Finance Corporation to retain these funds as a belated assignee of Treasure Company is to place the stamp of approval upon the unfair and unjust operation of this oil venture by Treasure Company.

The Reconstruction Finance Corporation is not a bona fide assignee for value without notice of these appellants' claims pertaining to their just proportion of the income. *The Reconstruction Finance Corporation had full notice of our equities.*

The Plaintiff, Reconstruction Finance Corporation Was Placed on Notice That the Adamant Company, Walter B. Scoville, and Harry Wynn Claimed a Lien Against Any Moneys to Be Paid to the Treasure Company by Reason of This Condemnation Suit Five and One-half Years Before It Acquired the Interest of Treasure Company by the Contract and Assignment Dated May 31, 1949. [Adamant et al., Ex. 1.]

On or about December 8, 1943, these appellants filed an Answer in the case at bar, and in said Answer set forth their equitable *lien* in the following words:

Paragraph XI of the first defense alleged in substance as follows:

“That Treasure Well No. 8 has produced oil and gas from on or about the 15th day of December, 1938, to September 28, 1942, of the value of over \$205,411.68, and said Adamant Company has thereby acquired a further interest in the said leaseholds of the value of \$51,452.92, being 25 per cent of said production value.” [R. pp. 19-20.]

The Second Defense in Paragraph V thereof alleges the above production of \$205,411.68 and then states:

“that said Walter B. Scoville has thereby acquired a further interest in the said leasehold of the value of (\$34,919.98) being 17 per cent of said production.” [R. p. 21.]

(A typographical error alleged \$14,378.82 instead of the correct figure of \$34,919.98—the 17 per cent however was alleged, making it a matter of mathematical calculation to arrive at the correct figure in dollars and cents.)

The Third Defense in said Answer alleged the above production and then stated that:

“the said Harry Wynn has thereby acquired an interest in said leaseholds of the value of \$10,270.58, being 5 per cent of said production value.” [R. pp. 22-23.]

The Adamant Company, Walter B. Scoville, Joe Seeples and Harry Wynn have received no moneys from Treasure Company or G. de Bretteville from the production of Treasure Well No. 8, excepting one check of \$88.54 paid to Harry Wynn in April of 1939.

These defendants have an equitable lien and claim against the moneys awarded by the jury as compensation for the taking of the leasehold by the Reconstruction Finance Corporation in the total sum of \$96,543.35 in addition to their claims of \$60,328.75, \$38,610.40 and \$14,478.90 as *owners* of working interests in Treasure Well No. 8.

These defendants further submit that at the time the Reconstruction Finance Corporation and the Southern California Gas Company agreed to assume the liability of Treasure Company as set forth in the contract of May 31, 1949 [Adamant *et al.*, Ex. 1—February 23, 1950], they had *full notice* of the above claims as set forth in our Answer filed December 8, 1943, approximately five and one-half years previous to this assumption of liability by the Reconstruction Finance Corporation.

Reconstruction Finance Corporation Under the Law of California, Which Governs in Condemnation Suits, Is Obligated to Pay Adamant Company, Walter B. Scoville and Harry Wynn All Moneys Due Them Upon Their Equitable Lien Against That Portion of the Jury Award Which Belonged to Treasure Company, or Its Assignee, the Reconstruction Finance Corporation.

“The payment of royalties out of a production of an oil well is a continuing obligation, and the recipient of those royalties has an interest in the land so long as her right to royalty continues.” (Citing *La Laguna Ranch Co. v. Dodge*, 18 Cal. 2d 132, 114 P. 2d 351.)

Recovery Oil Company v. Van Acker, 96 Cal. App. 2d 909-912 (April, 1950) (Supreme Court denied hearing June 8, 1950).

On September 28, 1942, the plaintiff, Reconstruction Finance Corporation, in this action seized possession of a producing oil well, and hence was immediately placed on notice that there must be outstanding royalty interests and that if the owners of those royalty interests had not received their just proportion from *its production* they continued to have a *vested interest* in the property or *leasehold* until such time as they are fully paid their share of the production.

Furthermore, as noted above, *these claimants* in their Answer, set forth the fact of their title and interest in this production which constituted an *interest in the land* and the payment for which had not been received by them.

The Owner of a Royalty Interest Has an Interest in the Real Property, and Such Interest Vests in Such Owner as an Estate Until Such Time as Such Owner Has Received Payment on His Royalty Interest.

We quote from *Recovery Oil Company v. Van Acker*, 96 Cal. App. 2d 909 at page 912, as follows:

“Any obligation to pay was not only a continuing one but she had an interest *in the land*, which did not terminate until she actually received that amount of money. Her interest was vested as an estate and not as a lien. Her position was similar to that of a holder of a trust deed. The Appellant, taking with notice, was in no position to demand relief in a Court of Equity as against the respondent, without recognizing and assuming the obligation which thus continued to exist.” (Supreme Court denied petition for hearing June 8, 1950.)

The Federal Judicial Procedure in Eminent Domain Lies Partly in Equity and Partly in Law.

“Federal Judicial Procedure in this field lies partly at equity and partly at law. (*Searl v. School District* 124 U. S. 197, 199, 8 S. Ct. 460, 31 L. Ed. 415.”

Welch v. Tennessee Valley Authority (1939), 108 F. 2d 95-98 (Certiorari denied, 1940).

“The award stands in the place of the property. *Washington Water Power Company v. United States*, 9 Cir., 135 F. 2d 541. The question must be determined on the basis of *equity* and *justice*. *Cobo v. Tennessee Valley Authority*, 6 Cir., 108 F. 2d 95; *Welch v. Tennessee Valley Authority*, 6 Cir., 108 F. 2d 95.”

United States v. Alberts, et al. (1945), 59 Fed. Supp. 298, 299.

It seems clear that not only are these claimants entitled to receive in the condemnation suit the value of their interests, based upon the *potential* production of the well at the time that the Government took possession of same, which values were testified to by Government experts, but these claimants *are also entitled to an equitable lien against the property for the amount of money due them under their royalty interests.*

This equitable lien attaches to the funds *substituted* for the land and now in the possession of the Registry of the Court, and which the Reconstruction Finance Corporation claims as a *belated assignee* of Treasure Company.

The evidence sustains the right to an equitable lien contrary to the second paragraph of Finding XXVIII. [R. p. 147.]

JOINT ADVENTURE ALONE ESTABLISHES AN EQUITABLE LIEN.

An Equitable Lien Is Established Against the Funds Awarded by the Jury in Its Verdict for the Taking of Treasure Well No. 8 Leasehold and in Favor of These Appellants by Reason of the Fact That the Completion, Maintenance and Operation of Said Leasehold Was a Joint Adventure, According to a Final Judgment of the Superior Court of the State of California.

The Findings of the Superior Court of Los Angeles County in the case of Walter B. Scoville, Joe Seepie, Harry Wynn and the Adamant Compony against G. de Bretteville and Treasure Company, defendants, contained a Finding reading, in part, as follows:

“* * * and a charge against the *joint adventure* of plaintiffs and defendant, Treasure Company, in connection with the completion, maintenance and *oper-*

ation of said well 'Treasure No. 8.' ” [Finding XXI (a)(6)—Jury Trial, Rep. Tr. p. 493; Ex. “E.”; R. p. 449.]

It is axiomatic that the property of a joint adventure is held and is subject to a trust for the benefit of all parties to such joint adventure.

Such property cannot be taken in condemnation without accounting to all members of the joint adventure, not only as to their title in the property but also as to any *lien* they have upon the *entire title*.

As between the parties to a joint adventure one of them who makes advances for the promotion of the venture may have a claim or lien therefor *on the property of the adventure*, which is similar to a partner's lien. (30 Am. Jur., Sec. 30, pp. 692-693. Notes 15 and 16.)

The Supreme Court of California recently reiterated the fundamental rights of joint adventurers *in the property* belonging to the adventure as follows:

“(1) Where the evidence clearly shows the parties' intention to engage in a joint enterprise for profit it has been held that the principles governing joint venture apply irrespective of how title to the property is taken. (McNab v. Mills, 199 Cal. 231 (248 P. 657); Bastjan v. Bastjan, 215 Cal. 662 (12 P. 2d 627); Swartout v. Gentry, 62 Cal. App. 2d 68 (144 P. 2d 38.)) (2) Each coadventurer or partner is a trustee for the other and *neither* may reap a personal *pecuniary advantage* from the use of the partnership property. (Perelli-Minetti v. Lawson, 205 Cal. 642, 647 (272 P. 573); Nelson v. Abraham, 29 Cal. 2d 745, 751 (177 P. 2d 931).)” (Emphasis added.)

Larson v. Thoresen (February, 1951), 36 Cal. 2d 666, 226 P. 2d 571.

These claimants and appellants submit that since the Treasure Well No. 8 leasehold was *property belonging* to the joint adventure, as held by the Superior Court of Los Angeles County in its Judgment (referred to in the Findings in the instant case as the Vickers Judgment) that the property so condemned *is subject* to the claims of these appellants for moneys due them *out of the production* of the property, which moneys were never paid to them by Treasure Company.

Since the Reconstruction Finance Corporation took an assignment from the Treasure Company of all its right, title and interest in the joint adventure, and in view of the fact that it was then informed of the contents of the Answer filed by these claimants, of these existing claims, said Reconstruction Finance Corporation is *in no better position than Treasure Company*, and all moneys due under this award are subject to the rights of these claimants and appellants to the full extent of the production of \$205,-411.69 less operating expenses of \$3.30 per one per cent per month for a period of 3 years and 9 months prior to the seizure in this condemnation action on September 28, 1942.

These appellants owned 47 per cent of the production—47 per cent of \$205,411.69 equals \$96,543.49—47 multiplied by \$3.30 equals \$155.10 which sum is the *monthly* operation charge against these appellants. 45 months (3 years and nine months) operation charge amounts to \$6,979.50. Deducting this operation charge from \$96,543.49 leaves \$89,563.99, *the net amount of the equitable lien against the funds belonging to Treasure Company or its belated assignee*, the Reconstruction Finance Corporation.

In *Ketchum v. St. Louis*, 101 U. S. 306, the United States Supreme Court affirmed a judgment declaring an *equitable lien or charge* upon the earnings of the Pacific Railroad of Missouri as prior and paramount to any mortgage or other lien thereon, to the extent of \$4,000 per month, payable monthly, and \$1,000 payable in each month of December to meet the interest upon \$700,000 of bonds issued by the County of St. Louis and by it loaned to the Pacific Railroad Company, such payment to continue until the bonds were fully paid by the company.

The decree declared the lien to exist and to be enforceable upon the railroad property and franchises, against the funds in the hands of the receiver in this suit, as well as the purchaser, under the mortgage foreclosure sale to be hereafter referred to.

The opinion of the Supreme Court read, in part, as follows:

“The learned Judge who heard this cause in the circuit court rested the decree upon the proposition of law, that ‘if a debtor by a concluded agreement with a creditor sets apart a specific amount of a *specific* fund in the hands, or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties and *upon all persons with notice who subsequently claim an interest in the fund* under the debtor.

* * * * *

“We are of the opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with *notice thereof*. The relief granted by the decree seems to

be in accordance with the established rules in such cases.

“In *Legard v. Hodges*, Lord Thurlow said: ‘I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him involuntarily, or with *notice, raised a trust*. These persons have so claimed; and, therefore, this is a pure trust estate,’ and they must be declared trustees. 1 Ves., Jr. 478. In the report of that case in 3 Bro. Ch. 531, the Chancellor says: ‘I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the *land itself* will be affected by the agreement.’ Upon rehearing, the former decree was affirmed. 4 Bro., Ch. 422.

“In *re Strand Music Hall Co.*, 3 DeG., J. & S., 147, the question arose whether that company had created a valid charge on their real property. ‘There can, I think,’ said Lord Justice Turner, ‘be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend, however, that where this court is satisfied that it was intended to create a charge and that the parties who intended to create it had the power to do so, it will give the effect to the *intention*, notwithstanding any mistake which may have occurred in the attempt to effect it.’”

The doctrine is thus stated by Mr. Justice Story in his *Equity Jurisprudence*, Vol. II, Sec. 1231:

“Indeed, there is generally no difference in equity in establishing a lien, not *only on real estate*, but on personal property, or on money in the *hands of a third*

person, wherever that is a matter of agreement, at least against the party himself, and *third persons* who are volunteers or *have notice*; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust."

The author cites, in support of these views, *Legard v. Hodges* (*supra*).

So, also, in *Pinch v. Anthony*, 8 Allen 536:

"It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but *also against third persons* who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be *compelled in equity to fulfill it*."

In the recent work of Mr. Jones on Mortgages, Vol. I, section 162, the author remarks:

"In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging

real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are, therefore, called *equitable* mortgages.”

So, also, in his treatise in Railroad Securities, p. 57, the same author says:

“An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge.”

Willard, Eq. Jur. 462;

Watson v. Wellington, 1 Russ. & M. 604;

Yeats v. Groves, 1 Ves. Jr., 280;

Lett v. Morris, 4 Sim. 607;

Ex parte Alderson, 1 Madd. 53.

“Further citation of authority would seem to be unnecessary. If any doubt exists as to the case coming within these recognized principles of equity, it is sufficient to say that the appropriation of the earnings of the Railroad Company as security for the loan by the County was in pursuance of a special Act of the Legislature; and in sustaining the decree below we give effect to the legislative will as to matters over which its authority unquestionably extended.

* * * * *

“Nor could parties who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the Act of 1865, destroy the equitable lien of the County, even with the consent of the Railroad Company. With the lien the property

itself was chargeable by whomsoever it *or the funds accruing therefrom are or may be held.*" (Emphasis added.)

Ketchum v. St. Louis, 101 U. S. 306.

In the case at bar equity will enforce the lien against the *property* or the *funds* substituted for the property in the eminent domain proceedings.

"When a lien upon land for improvements is claimed and the property is conveyed to an assignee for the benefit of creditors and then under an agreement between the assignee and the lien-claimant, the property is sold by the assignee and the moneys deposited to await an adjudication of the rights of the parties a *court of equity* will entertain jurisdiction and *enforce* the lien against the funds—the sale price of the property—in lieu of the lien against the property."

Lockett v. Robinson (1893), 31 Fla. 134, 12 So. 649, 20 L. R. A. 67.

In the case at bar the claim against the production funds and the resultant lien against the well and leasehold are transferred to the funds awarded by the jury as the value of the property and leasehold.

Conclusion on Point II.

We submit that the trial court erred in denying Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn an equitable lien against all moneys of the jury award belonging to Treasure Company or its belated assignee, Reconstruction Finance Corporation.

GENERAL CONCLUSION.

Point I.

The Adamant Company is entitled to 25/80.6 of the jury award of \$194,500.00 being the sum of \$60,328.75.

Walter B. Scoville is entitled to 16/80.6 of the jury award of \$194,500.00, being the sum of \$38,610.40.

Harry Wynn is entitled to 6/80.6 of the jury award of \$194,500.00, being the sum of \$14,478.90.

The above figures compensating them for their ownership of the respective stated percentages in the leasehold upon which Treasure Well No. 8 was drilled.

Point II.

The Adamant Company, Walter B. Scoville and Harry Wynn have an equitable lien against all sums of money to be allocated to the Treasure Company or its belated assignee, the Reconstruction Finance Corporation, to the extent of 47 per cent of \$205,411.68, amounting to \$96,543.35, less the operating charge of \$6,979.50 (which the Government witnesses testified was a sufficient operating charge), or a net equitable lien of \$89,563.99.

Respectfully submitted,

LELAND J. ALLEN,

*Attorney for Appellants, The Adamant Company,
Walter B. Scoville, Joe Seepie and Harry
Wynn.*

No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD
and MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLER
and HARRY WYNN; UNITED STATES OF AMERICA and
RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward.

WILLIAMSON, HOGE & CURRY, and
FULTON W. HOGE,
417 South Hill Street,
Los Angeles 13, California,

*Attorneys for Appellants Herschel Bullen,
Mary H. Bullen, J. C. Hayward and
Mary S. Hayward.*

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PAUL P. O'BRIEN

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vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; UNITED STATES OF AMERICA and
RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward.

Jurisdiction.

This was originally a suit by the United States to condemn land in Los Angeles, California. The statutes under which it was brought are set out in paragraph 6 of the Amended Complaint. [Tr. 5.] The District Court had jurisdiction under Title II of the Second War Powers Act of March 7, 1942, c. 199, sec. 201, 56 Stat. 176, 177, 50 U. S. C. App. sec. 632, as extended by Executive Order 9217, August 7, 1942, 7 F. R. 6177, 50 U. S. C. App. following sec. 632, and Section 1 of the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C., sec. 257. The judgment appealed from, which is not the original judgment in the case, was entered on October

30, 1950. [Tr. 154-156.] A motion for a new trial by the petitioners and appellants Herschel Bullen, Mary H. Bullen, his wife, J. C. Hayward and Marion S. Hayward, his wife, was denied on December 11, 1950. [Tr. 184.] A notice of appeal was filed by the appellants Bullen and Hayward on January 16, 1951. [Tr. 190-191.] This court has jurisdiction of the appeal under 28 U. S. C. A. 1291.

Statement of the Case.

A. Introductory Statement.

This part of the case involves the determination of the rights of various claimants in a fund awarded by the jury as the value of a certain oil well, which was part of the property condemned. The entire working interest in the well was valued by the jury, judgment was entered thereon, and the money was deposited in court. The judgment placing a valuation upon the oil well in question, and various other parcels of land involved in the suit, not the judgment appealed from herein, was entered on July 13, 1949, and is now final. [Tr. 67-79.]

Thereafter, in a separate proceeding, but in the same case, the lessee, and other holders of parts of the working interest, being various royalty interests assigned by the lessee, or derived from assignments made by the lessee, petitioned the court for distribution of the award. Their claims are in part conflicting. A hearing on these claims was held by the court and judgment was entered October 30, 1950. [Tr. 154-156.] The case comes up on an appeal by all parties from that judgment.

The parties to the appeal are the Reconstruction Finance Corporation, in its capacity as assignee of Treasure Com-

pany, the lessee; The Adamant Company, Walter B. Scoville and Harry Wynn, who hold assignments made by the lessee of participating royalty interests in the well; Herschel Bullen and Mary H. Bullen, his wife, and J. C. Hayward and Mary S. Hayward, his wife (hereinafter sometimes referred to as the Bullens and Haywards), who hold assignments from Walter B. Scoville of participating royalty interests, being a part of the royalties theretofore assigned to Scoville by the lessee, Treasure Company, and who also hold an agreement, the so-called two for one agreement, entitling them to the payment of \$10,000.00 out of 15% of all oil and gas produced from the well; J. Orville Seepie, whose interest for the purpose of this proceeding is identical with that of Walter B. Scoville. [Tr. 96-97, and Finding XXXI, Tr. 148]; and the United States.

B. Questions Involved, and How They Arise.

The questions which affect only the rights of the appellants Bullen and Hayward are as follows:

(1) Does an agreement which provides for the payment of \$10,000.00 out of 15% of the gross production of an oil well give the holder of the agreement a property interest in the well?

The trial court held that such an agreement is merely a personal obligation, and creates no royalty or other property interest in the leasehold upon which the well is drilled [Conclusion of Law VII, Tr. 152]. The Bullens and Haywards appeal from that holding.

(2) Where such agreement is not executed by the owners of all interests in the leasehold, but all such owners had knowledge of the agreement, and benefited by the money which was paid for the agreement, are they all bound by it?

The trial court held that they were not so bound [Finding XXV, Tr. 146]. The Bullens and Haywards appeal from such ruling.

(3) Where such an agreement is executed by the owner of a royalty interest, does the agreement convey whatever interest that person had?

The trial court did not specifically rule on this point, but held, as noted above, that the agreement was only a personal obligation, and consequently not enforceable against any property involved in this proceeding, from which holding the Bullens and Haywards appeal.

Questions which affect the rights of all participating royalty holders, including the Bullens and Haywards, are as follows:

(4) Does the holder of a participating royalty which entitles him to the payment of a certain percentage of the net proceeds of the sale of oil and gas produced from an oil well, after the payment of operating expenses, have an equitable lien on the lessee's interest in the leasehold, to secure the payment of any such net proceeds which were wrongfully withheld from the royalty holder by the lessee in charge of the well?

The trial court held that there was no such lien. (Finding XXVIII, Tr. 147.] From this ruling the Bullens and Haywards, and presumably other royalty holders, appeal.

(5) If such lien exists, is it binding upon a purchaser of the lessee's interest, who takes with notice of the outstanding royalties?

The trial court did not rule on the point, doubtless because of that court's holding that no such lien existed.

(6) Where there are landowners' royalties outstanding, entitling the landowners to 19.4% of the production from an oil well, can the lessee, which owns the remaining 80.6% of the total production, assign 49% of the total production from said well, and have left anything more than 80.6% minus 49%, or 31.6%?

The trial court held, in effect, that it could. [Finding XVIII, Tr. 142, Conclusion of Law X, Tr. 153.] The Bullens and Haywards, and presumably the holders of all other participating royalties, appeal from that decision.

Another minor question involving only the Bullens and Haywards, is as follows:

(7) Where the parties to an accounting action stipulate that the master appointed by the court in that action shall be paid out of a fund deposited in court in a condemnation suit, can that stipulation be binding upon anyone who was not a party to the accounting suit, or to the stipulation?

The trial court held, in effect, that such a stipulation was binding upon the Bullens and Haywards, who appeal from that decision. [Finding XXVII, Tr. 146-147, Conclusion of Law X, Tr. 153.]

The questions involved in the controversy between Reconstruction Finance Corporation and Harry Wynn as to the ownership of certain royalties are not stated here, since the Bullens and Haywards are not affected thereby.

The questions involved in the appeal of the United States and also of the Reconstruction Finance Corporation on the point of whether the award was made for one or two leases, are not discussed in this brief, because the trial court ruled in favor of these appellants and the other participating royalty holders on that point, and any discussion thereof by the appellants Bullen and Hayward will be reserved for their brief as appellees.

C. Statement of Facts.

Treasure Company was the owner of the lessee's interest in oil leases on certain parcels of land in the Del Rey Hills, Los Angeles County, California. Two of these leases, being the ones with which we are here concerned, are known as the Fletcher Lease and the Burns No. 1 Lease.

Treasure Company commenced the drilling of an oil and gas well on Lot 9 of the Fletcher Lease, which well thereafter became known as Treasure Well No. 8. In drilling the well Treasure Company ran into financial difficulties and negotiations were started with The Adamant Company through Walter B. Scoville looking toward financing the well and completing it. The negotiations resulted in the execution of a written contract, dated April 5, 1938, between Treasure Company, as first party, The Adamant Company, as second party, and Walter B. Scoville, as third party. [Treasure Company's Exhibit QQ in this proceeding. An addendum to that agreement is Treasure Company's Exhibit RR in this proceeding.]

The agreement of April 5, 1938, recited that Treasure Company had acquired the Fletcher and Burns No. 1 Leases, among others, that it had commenced the drilling of a well on the Fletcher Lease, that it proposed to combine the Burns No. 1 Lease "with the above-mentioned Fletcher Lease in the one drill site," and that it desired funds to complete the well. The Adamant Company agreed to advance the sum of \$10,000.00 to be used for that purpose. Treasure Company agreed to assign to The Adamant Company a 25% participating royalty interest in all leases, and to assign to Walter B. Scoville a participating royalty interest of 19% "in the Fletcher and Burns No. 1 Lease if the well is completed for less than 1,000 barrels."

The well was so completed for less than 1,000 barrels. The agreement further provided that should the first well be completed for 200 barrels per day or less, the agreement would terminate, and that The Adamant Company and Scoville would quitclaim to Treasure Company all their interests "except as to such first well." The first well, which is known as Treasure Well No. 8, was completed for less than 200 barrels per day, and no other well was ever drilled.

In order to obtain funds to assist The Adamant Company in complying with its obligations under this agreement, Walter B. Scoville entered into an agreement with the Bullens and Haywards, petitioners and appellants herein, whereby they agreed to contribute a total of \$5,000.00, \$2,500.00 from each couple, to be used in completing the well. The money was paid over and was so used. In consideration thereof, Walter B. Scoville agreed to assign to each couple from his royalty interest a 1% interest, or an aggregate of 2%. Scoville also agreed that the money so invested was to be repaid two for one out of the first 15% of gross production from the well. The plan as evolved by Walter B. Scoville was approved by both The Adamant Company and Treasure Company. [Findings XXIV and XXV, Tr. 145-146.] The court refused to allow these appellants any part of the award for this latter agreement, and allowed appellants \$1,917.00 for each of the 1% interests, or a total of \$3,834.00.

The agreement with the Bullens and Haywards is in writing, and consists of two documents. One is a letter

dated September 27, 1938, from Herschel Bullen to George Halverson, a Los Angeles attorney, who was at that time representing Walter B. Scoville and The Adamant Company in their negotiations with Treasure Company. This letter encloses two cashier's checks in the amount of \$2,500.00 each, and authorizes their use upon compliance with the terms of the letter, and compliance with an application to the Commissioner of Corporations of the State of California, which was also enclosed with the letter, and which is the second document making up the written contract. Both the letter and the application, in paragraph II thereof, state the consideration which the Bullens and Haywards were to receive, viz., two participating royalties of 1% each, and repayment of the money two for one out of production, *i. e.*, \$10,000.00, which, as stated in the letter, was to come out of the first 15% of the gross production from the well. At the bottom of the letter is the typed statement, "We agree to the foregoing." The signatures of both Walter B. Scoville and The Adamant Company were affixed to this statement.

A carbon copy of the letter is in evidence as petitioners Hayward and Bullens' Exhibit 1. The original has been lost. However, the copy in evidence also bears the signature of Walter B. Scoville, so it is an original as far as he is concerned. [Tr. 1196-1198, and 1226.]

The application to the Commissioner of Corporations which, as noted above, also sets forth in paragraph II thereof the consideration to be received by the Bullens and

Haywards, contains a statement at the end thereof as follows:

“Treasure Company, the issuer of the securities involved in the foregoing application, does hereby join in and consent to said application.”

Below that is the signature of Treasure Company, by its secretary, I. Cowan, and its corporate seal. Below that is the following:

“J. Orville Seepie, as agent of Walter B. Scoville and The Adamant Company, does hereby join in and consent to the foregoing Application and the transfer therein referred to.”

Below this appears the signatures of The Adamant Company, by Helen Scoville, Secretary and J. Orville Seepie. [Page 4 of the application, which is the fifth document of petitioners Hayward and Bullens' Exhibit 2. See also, [Tr. 1200-1203.]

The agreement of April 5, 1938 [Treasure Company's Exhibit QQ] in the last paragraph thereof, as modified by the addendum [Treasure Company's Exhibit RR], provides for management of the well by an executive committee consisting of J. Orville Seepie, representing The Adamant Company, G. de Bretteville, representing Treasure Company, and Harry Wynn. The cashier's checks by which the Bullens and Haywards paid in their investment were made payable by endorsement to “Treasure Company Trust Fund” and were endorsed “Treasure Company Trust Fund, by G. de Bretteville, Trustee.”

[Petitioners Hayward and Bullens' Exhibits 3 and 4, and Tr. 1204-1205.] de Bretteville was also the President of Treasure Company.

Pursuant to the agreement of April 5, 1938, Treasure Company issued assignments to The Adamant Company of participating royalty interests covering 25% of all oil and gas from the leases owned by it and described in the agreement, to Walter B. Scoville 19% of all oil and gas produced from the Fletcher and Burns No. 1 Leases, and to Harry Wynn $2\frac{1}{2}\%$ of all the leases. [Finding XVI, Tr. 140.] Treasure Company later agreed to issue to Harry Wynn an additional $2\frac{1}{2}\%$. [Tr. 144.] Walter B. Scoville also agreed to assign 1% to Harry Wynn, which came out of said Walter B. Scoville's 19% interest. [Finding XXVI, Tr. 146.]

Pursuant to the agreement of September 27, 1938, Walter B. Scoville made a formal assignment of a 1% participating royalty to Herschel Bullen and Mary H. Bullen and another 1% to J. C. Hayward and Mary S. Hayward. [Finding XVII, Tr. 141-142, and see the second and third documents of petitioners Hayward and Bullens' Exhibit 2. These are assignments dated October 2, 1938, from Scoville to said petitioners, respectively, of 1% to each couple, or an aggregate of 2% of the production from all the leases. In so far as they pertain to Burns' No. 2 and No. 3 Leases, they are no longer effective, because, as noted above, the first and only well, Treasure Well No. 8, was brought in for less than 200 barrels per day, so that Scoville's rights under the agree-

ment of April 5, 1938, terminated, and consequently the rights of his assignees terminated, except for the interest in said first well.]

No separate assignment was ever made to the Bullens and Haywards of their right to 15% of the gross production from Treasure Well No. 8, limited to the payment to them of \$10,000.00, and their rights to such limited royalty interest depend upon the contract of September 27, 1938. [Petitioners Hayward and Bullens' Exhibit 1, p. 2 thereof, and the fifth document of their Exhibit 2, par. II thereof.]

In the valuation trial which occurred before this proceeding, settlement was made with the holders of landowners' royalties, and the jury put a value of \$194,500.00 upon the working interest in Treasure Well No. 8. [Tr. 65, 4th item.] Judgment was duly entered upon the verdict [Tr. 67-79], and is now final. By stipulation of the parties the landowners' percentage of production was 19.4% [Tr. 1165], leaving 80.6% as the working interest.

Summarizing the assignments above set out, this 80.6%, which is now represented by the award of \$194,500.00, was held as follows:

First: 15% of the gross production from the well was to be paid out of this interest to the Bullens and Haywards until they received \$10,000.00 (plus interest on sums accrued and not paid);

Second: Subject to payment of the foregoing sum, and interest, the ownership of said 80.6% of the total production from the well was as follows:

The Adamant Company	25% of total production
Walter B. Scoville (19% less 2% assigned to Bullens and Haywards and 1% assigned to Harry Wynn)	16% of total production
Bullens and Haywards	2% of total production
Harry Wynn	6% of total production

Total percentage of produc-
tion assigned by the lessee,

Treasure Company 49% of total production

Balance owing to Treasure
Company, the lessee, or its
successor Reconstruction

Finance Corporation 31.6% of total production

Total working interest 80.6% of total production

Upon the completion of Treasure Well No. 8, a dispute arose among the parties to the agreement of April 5, 1938. The drilling had been in charge of the committee appointed under that agreement and the addendum thereto, but on December 16, 1938, the well was taken over by Treasure Company, and it was in the possession of and operated by that company until it was condemned by the Government in this case. During the period of operation by Treasure Company, the oil and gas produced from the well were sold for \$205,411.69 [Tr. 1235-1236], no part of which was ever paid over to the royalty holders who are parties to this proceeding. [Tr. 1216-1217.]

In June of 1939, Walter B. Scoville, J. Orville Seepie, Harry Wynn and The Adamant Company brought suit in the Superior Court of the County of Los Angeles, State of California, against G. de Bretteville and Treasure Company, seeking to have a receiver appointed to take possession of the property, and for an accounting. In this case, which has been referred to in this proceeding as the Vickers case, Judge Vickers found that the well, Treasure Well No. 8, had been completed for less than 200 barrels per day, and held, therefore, that the agreement of April 5, 1938, and the addendum thereto, had terminated, except for the royalty interests in Treasure Well No. 8, and that such interests continued. This judgment was affirmed on appeal. (*Scoville v. de Bretteville*, 50 Cal. App. 2d 622, 123 P. 2d 616.)

The Adamant Company and Walter B. Scoville brought another accounting suit against Treasure Company and G. de Bretteville, which is now pending before another Judge in the United States District Court for the Southern District of California, Central Division. A Special Master was appointed, and made a report in that case, and by stipulation of the parties, the court made an award to him of \$2,800.00 as compensation for services. The parties further stipulated that said \$2,800.00 would be deducted from the \$194,500.00 award made by the jury in this case. Judge Westover accordingly found that the award should be reduced to a net of \$191,700.00. [Finding XXVII, Tr. 147.] The appellants Bullen and Hayward are not parties to the accounting action or to said stipulation, but the court herein nevertheless used such reduced amount in determining their interest. [Conclusion of Law X, Tr. 153.]

Specification of Errors.

1. The court erred in holding that the enforcement of the so-called two for one agreement was a personal matter, and not one for settlement in this case. [Conclusion of Law VII, Tr. 152.]

2. The court erred in finding that neither Treasure Company nor The Adamant Company is bound by the two for one agreement. [Finding XXV, Tr. 146.]

3. The court erred in failing to hold that the two for one agreement should be enforced at least against the interest of Walter B. Scoville in the award made in this case.

4. The court erred in holding that the Bullens and Haywards have no equitable lien upon moneys due to any of the parties herein. [Finding XXVIII, Tr. 147.]

5. The court erred in holding that the percentages assigned by Treasure Company to participating royalty holders were percentages of the working interest rather than percentages of total production from the well. [Finding XVIII, Tr. 142; Conclusion of Law X, Tr. 153.]

6. The court erred, so far as the Bullens and Haywards are concerned, in reducing the award by the amount of the Master's fee in the accounting case. [Finding XXVII, Tr. 146-147, and also Conclusion of Law X, Tr. 153.]

ARGUMENT.

I.

The Two for One Agreement Is a Royalty.

Over a period of years, the California courts have thoroughly considered and determined the nature of a wide range of instruments by which the owner of the right to take oil from the ground has assigned or agreed to pay over to another a part of such oil, or the proceeds of sale thereof. It has now been definitely established that the holder of such an assignment or agreement has a present legal property interest, known as a royalty. While the royalty holder does not have an undivided interest in the profit *a prendre*, because he has no right to possession of the property, and no right to take the oil himself, he nevertheless has an interest in the real property. These general propositions are now too well settled to require any argument or authority.

Fortunately for the appellants in this case, a royalty of the precise kind created by the two for one agreement has been passed upon by the California courts. This was the instrument involved in the case of *Recovery Oil Co. v. Van Acker*, which was before the District Court of Appeal on two occasions, reported in 79 Cal. App. 2d 639, 180 P. 2d 436, and 96 Cal. App. 2d 909, 216 P. 2d 483.

In this case, certain people held a prospecting permit authorizing them to explore for oil on land owned by the United States. They executed a document reading in part as follows:

“The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen per cent (15%) of the oil, gas and other hydrocarbon

substances produced, saved and sold from the said premises so covered by said Operating Agreement, (less amount used in operations on the premises) until such time as said assignee shall have received the sum of Twenty Thousand Dollars (\$20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end.” (79 Cal. App. 2d at 640.)

Thereafter the holder of this assignment assigned a half interest in it to one of the defendants, the appellant in the first case. The interest of the original permit holders was acquired by the plaintiff corporation, which brought a quiet title suit seeking, among other things, to quiet its title against the rights of the holder of said assignment.

We thus have a case which, by a strange coincidence, is exactly the same as the case at bar, even as to the figures. In the *Van Acker* case, the holder of the second assignment, which was half of the first one, was entitled to 15% of all oil produced, saved and sold until she had received payment of \$10,000.00. In our case the appellants Bullen and Hayward, under the two for one agreement, are entitled to \$10,000.00, to be paid out of the first 15% of gross production.

When the appellants Bullen and Hayward paid in their \$5,000.00 the money was sent with a letter [Petitioners Bullen and Haywards' Exhibit 1] which stated the following as one of the conditions upon which the money was to be accepted and used:

“First, when Walter B. Scoville and certain of his friends advance the necessary funds—these funds, \$5,000.00, to be included in the said necessary funds to be repaid two for one out of production—to fully

comply with paragraph II of page 2 of said application herewith enclosed, it being understood and agreed to that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well."

Paragraph II of the application which was enclosed in the same letter, and is referred to in the above quotation, reads in part as follows:

"The well described in the application of Treasure Company for a permit has been drilled to the depth of 6510 feet and is now ready for completion. In the opinion of all interested parties the cores and technical tests fully justify the completion and testing of this well. Applicant, Walter B. Scoville, desires to assist in completing said well and certain of his friends and business associates are willing to advance the necessary funds, to be repaid two for one out of production."

The terms of the letter were agreed to by The Adamant Company and Walter B. Scoville, and the application was agreed to by Treasure Company. [Petitioners Bullen and Haywards' Exhibit 2, p. 4 of the next to the last document.]

We thus have in the case at bar a somewhat informal agreement, as compared with the formal assignment in the *Van Acker* case, but the substance of the writing is the same in each case. The effect of the assignment in the *Van Acker* case was merely an agreement on the part of the owner of the prospecting permit to pay to the predecessor of the appellant in that case 15% of the proceeds of the total production until \$20,000.00 had been paid,

of which the appellant, the holder of a subsequent assignment of a one-half interest, was entitled to \$10,000.00.

The use of language of assignment instead of language of agreement to pay cannot make any distinction in substance. Even if the *Van Acker* document be regarded as an executed transaction in the nature of a deed, and our document be considered as executory, there could be no difference in result. It is fundamental that an agreement to sell real property, or an interest therein, vests equitable title in the buyer which is good as between the parties and against all having notice thereof. Indeed, the California Supreme Court has indicated that even a partly performed oral agreement to pay over a percentage of the net proceeds of oil and gas gives a property interest. (*Austin v. Hallmark Oil Co.*, 21 Cal 2d 718, 134 P. 2d 777.) In that case, the court said at page 726, the California report:

“By virtue of the oral grubstake agreement, Austin became the equitable owner of an undivided fifty per cent interest in any lease obtained by Porter pursuant to that agreement. (See *Berry v. Woodburn*, 107 Cal. 504 (40 P. 802); *Moritz v. Lavelle*, 77 Cal. 10 (18 P. 803, 11 Am. St. Rep. 229).) When, however, Porter subsequently assigned the lease to the Hallmark Oil Company, Inc., with Austin’s consent, retaining an interest in fifty per cent of the net income of the leasehold, Austin’s equitable interest or ownership was thereby limited to a share in the interest thus retained by Porter. It therefore appears that Austin’s claim and the judgment do not rest solely upon the written assignment of November 2nd, and that the assignment was made in recognition of rights already possessed by Austin.”

The *Van Acker* case is therefore on all fours with the case at bar, and it unequivocally holds that the right to receive 15% of the production until \$10,000.00 had been paid is a royalty interest, and therefore an interest in the land.

On the first appeal the trial court had quieted the title of the plaintiff as against this interest, and the judgment was reversed. One of the points raised by the respondent was: “. . . that the instrument did not assign any interest in the land but merely constituted a personal promise to pay money out of a particular fund.” (79 Cal. App. 2d 641.) The court dealt with this contention at pages 642 and 643, citing cases which hold that the form of the document is immaterial, and that the holder of a right to receive a share of the oil produced, or the proceeds of sale thereof, gross or net, has a property interest, good as against all who take with notice thereof.

In the second appeal (96 Cal. App. 2d 909, 216 P. 2d 483), there was a judgment for the defendant upholding the royalty interest, from which the plaintiff oil company appealed. On this appeal the plaintiff urged again a point which it had made in the first case, and which had been left open, this being the plaintiff's contention that the instrument, even if it gave a property interest, merely created a lien on the oil produced to secure the payment of the \$10,000.00, and that it was barred by the statute of limitations. On this point the court held (96 Cal. App. 2d at 912) that the respondent had a legal title and not a mere lien:

“Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed.”

The judgment for the defendant was affirmed. The case is therefore a clear decision to the effect that the holder of such an instrument has legal title to a limited royalty interest which continues until the money is paid, and which cannot be barred by the statute of limitations.

Another point raised by the appellant in the *Van Acker* case, or perhaps it is another facet of the statute of limitations point, was that long before this case arose, there had been produced from the premises sufficient oil to pay the defendant in full. The court held this to be immaterial, saying at page 912:

“The assignments by which the respondent acquired her interest assigned to her a certain share in the production from the land until such time as she received \$10,000. Her interest was to terminate when she received this amount, otherwise it would run for the full term of the lease. No date was fixed for the termination of her interest and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money.”

A petition for a hearing by the Supreme Court in the *Van Acker* case was denied.

Applying that case here, it necessarily follows that the appellants Bullen and Hayward acquired by the terms of the letter agreement a vested interest in the leasehold which would continue until they had received the sum of \$10,000.00. They have not received any payment thereon, and they therefore had this interest in the property when it was condemned by the Government.

The judgment entered by the court in the condemnation case proper, which is now final, expressly provided that:

“ . . . all valid liens, encumbrances and claims of whatsoever nature and description in said property, or any part thereof, are transferred from said property to the compensation payable by the plaintiff therefor.” [Tr. 74.]

This would, of course, be the law, even if the judgment had not so provided. *United States v. Certain Parcels of Land in Prince George's County*, 40 Fed. Supp. 436. In that case the court said at page 443:

“It is also to be noted that the effect of the taking by the authorized authority is to vest both title and possession in the Government and therefore presumably to *transfer all claims, both of ownership and lienors, whether legal or equitable*, to the fund, at least so far as such liens and charges may exist in favor of persons named or otherwise bound by the proceeding.” (Italics ours.)

We respectfully submit, therefore, that the appellants Bullen and Hayward are entitled to have paid to them the sum of \$10,000.00 out of the award which was made for the well, and that they are likewise entitled to interest on the component parts of this sum from the times when payments of parts thereof should have been made by the operator of the well, and that a further trial should be had to determine when the rights to such payments accrued, so that interest may be accurately determined, unless the parties can agree thereon.

II.

**The Two for One Agreement Is Binding on All
Owners of the Working Interest.**

The various holders of the working interest before the court are as follows:

(1) Reconstruction Finance Corporation, which is an assignee of the lessee, Treasure Company. The assignment was made after this litigation commenced, and the R. F. C., therefore, took with full knowledge of the rights of the appellants Bullen and Hayward.

As has been noted, the two for one agreement is made up of two documents, the letter and the application, both of which set out the rights of the appellants Bullen and Hayward to be repaid their investment two for one out of production. Treasure Company did not sign the letter, but it did sign the application as follows:

“Treasure Company, the issuer of the securities involved in the foregoing application, does hereby join in and consent to said application.

Treasure Company,
By: I. Cowan,
Secy.”

The corporate seal of the company was affixed. [Tr. 1201; Petitioners Hayward and Bullens' Exhibit 2, p. 4 of the next to the last document.]

It may be urged, and doubtless will be, that the consent of Treasure Company to this application was merely to indicate its consent to the transfer in escrow of the participating royalty interests. It is true that the purpose of the application was to obtain the consent of the Commissioner to this transfer, said royalty assignments having

been required by his permit to be placed in escrow, and not transferred without his consent. However, paragraph II of the application, on page 5 thereof, clearly states the entire deal with the Bullens and Haywards, under which they were to get not only a continuing 2% participating royalty interest, but their investment was to be repaid two for one out of production. At the very least, therefore, the consent of Treasure Company to the application shows knowledge of the terms upon which the money was provided by the appellants Bullen and Hayward. In fact, the court specifically found that:

“The plan as evolved by Walter B. Scoville was approved by both Adamant Company and Treasure Company.” [Finding XXV, Tr. 146.]

As noted in the Statement of Facts, the cashier's checks by which the appellants Bullen and Hayward paid in their investment were, by endorsement, made payable to “Treasure Company Trust Fund,” and were endorsed “Treasure Company Trust Fund, by G. de Bretteville, Trustee.” [Petitioners Bullen and Haywards' Exhibits 3 and 4, and Tr. 1204-1205.] de Bretteville was the president of Treasure Company. In addition, the court made a specific finding that the money was used in completing the well. [Finding XXIV, Tr. 145.] The well was at that time in possession of a committee appointed pursuant to an agreement entered into by Treasure Company, the lessee. One member of the committee was G. de Bretteville, appointed specifically to represent Treasure Company. [Treasure Company Exhibit QQ.]

We thus have a situation in which Treasure Company, even though the court should consider that it is not a party to the agreement, accepted the money of the appel-

lants Bullen and Hayward through representatives acting in its behalf, said money being accepted with knowledge of the terms upon which it was advanced, and the money was used for its benefit. Under these circumstances, it is submitted that Treasure Company is estopped to deny that it was a party to the agreement, and must be held to be bound by all of its terms and provisions. The law is well expressed in Section 1589 of the Civil Code, which reads as follows:

“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”

In *First National Finance Corporation v. Five-O Drilling Co.*, 209 Cal. 569, at 575, 289 Pac. 844 at 846, the court states:

“The law does not permit a corporation to receive and retain the benefits of a contract or transaction and at the same time repudiate liability thereunder or attempt to escape the burdens thereof on the ground that the contract or transaction was not authorized, or that the authority therefor was not set forth in its records.” (Citing cases.)

(2) The Adamant Company: The evidence shows that The Adamant Company signed the letter agreement, and it is believed that the finding of the learned trial court to the contrary [Finding XXV, Tr. 146] must have been inadvertent.

The carbon copy of the letter agreement of September 27, 1938 [Petitioners Bullen and Haywards' Exhibit 1] contained at the end thereof, under the endorsement “We

agree to the foregoing,” what purports to be a signature “The Adamant Company, by Helen Scoville, Secretary.” This signature was written on the document by appellant Bullen, because he received a letter from George Halverson, the attorney to whom the original letter had been sent, who was attorney of The Adamant Company [Tr. 1240], and who acted as escrow holder in the matter, stating:

“we merely had the Adamant Company and Walter B. Scoville Company and Walter B. Scoville agree to the terms contained in that letter.” [Tr. 1218-1219.]

The letter of March 25, 1939, from Halverson, making this statement about the original of the letter of September 27, 1938, was admitted in evidence. [Tr. 1293.] It was stipulated that Mrs. Scoville was authorized to sign the letter agreement of September 27, 1938. [Tr. 1223-1224, and 1240.]

Possibly there is some ambiguity in the stipulation as to whether or not it was intended to stipulate that the document bore the signature of Helen Scoville, or only that she had authority to sign it, and it must be admitted that the testimony of Mr. Halverson is not satisfactory on the question of whether or not she signed. He first testified that it bore her signature, but then added that he did not know her signature. [Tr. 1238-1239.] His letter, which is in evidence, states clearly, however, that he did have her agree to it, and it is at least stipulated that she had authority to do so.

Whatever the situation may be as to The Adamant Company being an actual party to the agreement, it is bound

by it, in any event, for the same reason that Treasure Company is bound by it. The Adamant Company was the owner of 25% of the total production of the well, subject

25

to the payment of —ths of the operating costs. The well's
80.6

completion, which was accomplished in part with the money of the appellants Bullen and Hayward, was, therefore, a direct benefit to it. It had knowledge of it, both through Halverson and as evidence by its approval of the application to the Commissioner of Corporations. [Petitioner Hayward and Bullen's Exhibit 2.] It cannot accept such benefit without accepting the burdens. (Civil Code, Sec. 1589.)

(3) Walter B. Scoville: The letter agreement of September 27, 1938 [Petitioners Hayward and Bullen's Exhibit 1], although it is a carbon copy, was in fact signed by Scoville [Tr. 1196], and he was the one who negotiated the transaction. As far as he is concerned, therefore, Exhibit 1 is an original.

(4) J. Orville Seeples: He was the agent of Walter B. Scoville and The Adamant Company, and represented them on the committee set up by the agreement of April 5, 1938, and the addendum thereto. [Treasure Company's Exhibits QQ and RR, respectively, in this proceeding.] Seeples's name also appears as a signer of the application to the Commissioner of Corporations [page 4 of the next to the last document of Bullen and Haywards' Exhibit 2.] Furthermore his interest is identical in this proceeding with that of Walter B. Scoville. [Finding XXXI, Tr. 148 and see Tr. 96-97.]

(5) Harry Wynn: He was a member of the committee which had charge of the completion of the well, being

appointed by the addendum to the agreement of April 5, 1938 [Treasure Company's Exhibit QQ], so that presumably he had knowledge of the terms of the financing which was done to provide for such completion. He also, as a royalty holder, benefited from the use of this money.

III.

The Two for One Agreement Is at Least a Charge on the Interest of Walter B. Scoville.

It appears from the foregoing that everyone owning part of the working interest in the well is bound by the two for one agreement. In any event, that agreement is, without any question of doubt, binding upon Walter B. Scoville, the man who negotiated it and who signed the copy of the letter of September 27, 1938, which sets it forth.

Assuming, for the sake of argument, that the agreement is binding only upon Scoville, it was manifestly error for the court to give it no effect whatever. On that view of the case, that is to say, assuming it was not binding upon anyone except Scoville, it was certainly effective to convey an interest out of whatever interest he held, and, as the court found, he held 19%, diminished by the 2% assigned to the appellants Bullen and Hayward and the 1% assigned to Harry Wynn, or a net interest of 16%. [Tr. 153.] Certainly anything which goes to him on this 16% must first be used to pay the appellants Bullen and Hayward under the two for one agreement. It is elementary that a conveyance which purports to convey more than the grantor owns does convey whatever he does own.

The situation here, still assuming that the agreement is binding only upon Scoville, would be closely analogous to a conveyance by one co-tenant of a specific parcel of the

entire property, without obtaining the consent of the other co-tenants. While this cannot affect the rights of the other co-tenants, the conveyance is valid and passes the interest of the grantor. (7 Cal. Jur. 359; *Gapes v. Salmon*, 35 Cal. 576 at 588.)

It is respectfully submitted that for this error, if for no other reason, the judgment which held that the two for one agreement was merely a personal obligation [Finding VII, Tr. 152], must be reversed.

IV.

The Appellants Bullen and Hayward and Other Holders of Participating Royalties Have an Equitable Lien Upon the Interest in the Well of the Lessee, Treasure Company, to Secure the Payment to Them of Their Share of the Net Proceeds of Operation.

The trial court properly held that the holders of participating royalties had a property interest in the well. [Finding XXXIV, Tr. 149; Conclusion of Law IV, Tr. 151.] Such a holding was, of course, necessitated by the leading case of *Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081, which held that the holders of participating royalties, that is to say, the holders of agreements entitling them to share in the net proceeds of the sale of oil produced, saved and sold, after payment of operating expenses, had a property interest in the well from which the oil was produced, which could not be cut off by sale of the lease to a purchaser who was chargeable with notice of their rights. At the time the *Schiffman* case was decided, the law in California on the subject of royalties had not crystallized, and it may be gathered from the opinion that the basis of it was that it would be inequitable to permit any other result.

The same conclusion had been reached by courts of equity centuries before. The principle of the equitable lien is an ancient one. In *Legard v. Hodges*, 1 Ves. Jun. 477, 29 English Reports Chancery, 684, the defendant, Anthony Hodges, at the time of his marriage, made a covenant that he would pay into the hands of the plaintiffs, as trustees, the sum of 10,000 pounds, and that "he would, after three years from the solemnization of the marriage, set apart an appropriate amount as a fund toward raising said 10,000 pounds, one-third part of the yearly rents arising from his several estates in Berks and Oxford" No part of the 10,000 pounds was paid, and plaintiffs filed this bill charging that the produce of the estates ought to be accounted to them, and one-third part thereof applied for the purpose of raising the 10,000 pounds, and praying an account of rents and profits received from the estates.

Mr. Mansfield and others for the defendants argued (page 696 of 29 English Reports) that "the covenant is merely a personal covenant by Hodges to appropriate the third part of the produce to the payment of the 10,000 pounds. An action would lie for the breach of it, and in such action damages to the amount of the third part might be recovered. But the estate itself is not bound by the covenant; there is no lien upon the estate itself." The Lord Chancellor after distinguishing a case cited by the defendants, said, at page 687:

"I take the doctrine to be true, that where the parties come to an agreement as to the produce of the land, that the land itself will be affected by the agreement."

And again on page 688, referring to a case which he had distinguished, he said:

“But, except that case, there are none to derogate from the generality of the doctrine that where a man makes an agreement relative to any subject, it will bind the subject itself.”

There would seem to be no reason why this general rule should not be applied to give the holders of the participating royalties a lien upon the leasehold to secure the payment to them of sums which the lessee in possession, Treasure Company, should have paid to them. Equity should not stop by saying that they have a continuing property interest, which was obviously intended, and which the California courts now hold, is a legal interest, but should go further, and give them complete relief. When the lessee agreed, by the assignments, that the holders thereof should be entitled to a certain percentage of the net proceeds of oil and gas produced, the lessee, in effect, agreed to hold the lease in trust for the assignees. Although the California courts have gone further and give the assignees a legal interest, the practical result is the same, and the meaning is the same, as the opinion in the *Schiffman* case will show. The same principles would require that the obligation to pay the money which was not paid should be a charge upon the property in the hands of the lessee, or rather upon whatever interest the lessee may have in the property.

An instance of the application of the doctrine of the equitable lien in an oil case is *Phillips Petroleum Co. v. Gable*, 128 F. 2d 943. In this case, Dixie, the operator of an oil well, bought some casing from the plaintiff, and agreed to pay a certain sum for it “out of the first

proceeds of one-half of Dixie's present interest in the production from said well." Some time later, Dixie borrowed some money from Morris, and secured it by a mortgage on its entire interest in the well. The operator later went into bankruptcy.

The court states at page 944:

"The contract gave Phillips an equitable lien upon one-half of Dixie's 30 per cent interest in the first proceeds from production from the well. (Citing cases.) The recording of the contract gave Morris constructive notice of the equitable lien, and required it to make reasonable inquiry. Had it done so, it would have discovered the Phillips lien and learned the debt secured thereby had not been fully paid."

We have no need to apply this case to the two for one agreement of the appellants Bullen and Hayward, because in California, as shown above, such an interest is a legal interest in the nature of a trust deed. However, the principle is the same, and the basic reason for deciding that the holder of such an agreement has a legal title or a lien, as the case may be, is the equitable doctrine that an agreement to make payments from the income of certain property creates a charge upon the property, and the reason for the doctrine is simply that equity and good conscience require such a result.

It may be noted that there is a distinction between the nature of the interest of the Bullens and Haywards and those of the holder of the interest which was enforced in the *Phillips Petroleum* case. There the holder of the equitable lien was an ordinary creditor, and his claim was enforced in bankruptcy. While some of the language used in the documents setting up the interest of the ap-

pellants Bullen and Hayward might indicate a debtor-creditor relationship, it is clear that they were investors only. They put their money into a wildcat oil well, and the deal was that if successful, not only would they get it back two for one, but they would also have a continuing small participation. No one, not even Scoville, agreed to repay the money, although it is spoken of as being "advanced." Repayment of the money, as well as the continued participation, was entirely contingent upon the successful completion of the well, or at least upon the successful completion of oil wells. We use the plural in this connection because the letter agreement of September 27, 1938 [petitioners Bullen and Haywards' Exhibit 1], did provide, in the third numbered paragraph thereof, that if the well was a failure, appellants Bullen and Hayward were to have comparable interests in certain property owned by Scoville or The Adamant Company in Wyoming. However, there was no time fixed for payment, and no personal obligation whatever of anyone to pay, the repayment being entirely contingent upon the coming in of one or more oil wells. As against any ordinary creditors of the enterprise, therefore, the appellants Bullen and Hayward and the other participating royalty holders could not have a lien. In fact they could not even share in assets until ordinary creditors were paid in full. (*In re Lathrap*, 61 F. 2d 37.) There are no ordinary creditors involved here, however. The question is simply whether the investors have an equitable lien as against the person who had charge of the enterprise, and purchasers with notice.

The *Phillips Petroleum* case is the only one we have been able to find in which the doctrine of the equitable lien has been applied in an oil case. This branch of our

case is somewhat different from the situation there, and also different from the factual situation in *Legard v. Hodges*. In both those cases there was an agreement to pay a specific sum out of the income from certain property. In our case there was an agreement to pay a certain percentage of net income from the property, to continue as long as there was income. This agreement, as held by the California courts, and followed by the district judge in this case, created a continuing interest in the property, a royalty. Our proposition is that when there was a subsequent failure to make specific payments which became due on the royalty, an equitable lien should attach and remain until such payments are made, for the same basic reasons that gave rise to the lien in the *Phillips Petroleum* case and *Legard v. Hodges*.

This charge should, of course, be made only against the remaining beneficial interest of the operating lessee, Treasure Company. That company was under a fiduciary relationship to the royalty holders. The latter had no right of possession, no right to go upon the property and take the oil themselves. They were simply investors in the enterprise, who had to look to the lessee to take out the oil, sell it, and give them their share. They were in the same position as the beneficiaries of a trust.

In this case the trustee was also a beneficiary. The lessee, after making the various royalty assignments, still had a part of the working interest left for itself. The law seems to be that when a trustee who is also a beneficiary commits a breach of trust, other beneficiaries have

a charge upon his beneficial interest to secure the payment to them of any losses caused by the breach. Such authorities are, perhaps, more closely in point than those dealing with the creation of an equitable lien to secure the payment of one sum agreed upon in advance.

It appears that the lien imposed upon the beneficial interest of a trustee who is also a beneficiary, to make good the breach of trust, comes ahead of the trustee's creditors. Mr. Scott in his work on Trusts, Volume 2, has this to say at page 1458:

“Where a trustee is one of the beneficiaries of a trust and his creditors seek to reach his beneficial interest under the trust, they stand in no better position than that in which he stands. If the trustee-beneficiary has committed a breach of trust, so that his interest is liable to be impounded to make good the breach of trust, his creditors cannot take it free from the charge of the other beneficiaries upon it.”

A distinction should doubtless be drawn here between creditors of the enterprise which is managed by the trustee and persons to whom the trustee owes money, whose advances had no relation to the trust property. At least such a distinction should be made where the beneficiaries stand in the position of investors in the enterprise, as they do here. (Cf. *In re Lathrap*, *supra*.) In any event, there are no creditors of any kind involved in the case at bar.

One of the cases cited by Scott is *Estate of Whitney*, 124 Cal. App. 109, 11 P. 2d 1107. In this case there were two trustees under a testamentary trust. One of

them was a bank officer. The other trustee allowed him to take charge of the money. He appropriated considerable sums. This trustee was also a beneficiary. The other trustee finally became suspicious, and employed a firm of auditors to examine the accounts, which resulted in the shortage being discovered. A surety on the trustee's bond made good a part of the loss for which it was responsible, and took an assignment of the trustee's beneficial interest in the trust. The court held that the expenses of the audit, and other expenses resulting from the defalcation, should be charged against and paid out of the defaulting trustee's beneficial interest in the trust. The court said at page 125:

“Where, as here, the court still has this fund in its control, we are of the opinion that it has the power and that it is its duty to subject the same to the payment of claims justly chargeable thereto, before paying said fund to the defaulting trustee, or to this assignee.”

In our case, the court likewise has control of the property out of which the payments should be made. The lease itself, as well as the fee of the property, has been condemned, and title has passed to the Government. In place of the lease, there is a sum of money in court. The beneficial interest therein of the defaulting lessee should be charged with payments which it was obligated to make to the other beneficiaries for whom it acted as trustee, before any part of the fund is paid over to lessee, or its assignee.

V.

The Reconstruction Finance Corporation, as the Successor of Treasure Company Is Bound by the Lien.

The interest of Treasure Company has been acquired by Reconstruction Finance Corporation with full notice of all the facts. [Finding XIII, Tr. 145.] Indeed, an accounting suit by some of the participating royalty holders was pending in the District Court when the Reconstruction Finance Corporation settled with Treasure Company and took over its interest. [Finding XXVII, Tr. 146.] The lien or charge upon the portion of the working interest owned by Treasure Company, and by it transferred to the R. F. C., should not, therefore, be in any way affected by such transfer. (*Phillips Petroleum Co. v. Gable, supra; Estate of Whitney, supra.*)

VI.

Appellants Bullen and Hayward Are Entitled, by Virtue of Their Ownership in the Aggregate of a 2% Participating Royalty, to Receive 2/80.6ths of the Award.

This point involves the rights of the other participating royalty holders as well as the appellants Bullen and Hayward, and we will leave the detailed development of it to their counsel. Fundamentally, it seems to us to be a question of the proper interpretation of the royalty assignments and of simple arithmetic.

Preliminarily, it may be noted that the award, in the amount of \$194,500.00, was given for the working interest in the well. This is a technical term in the oil industry of which the court may take judicial notice, and means all interests in the well after excluding landowners' and

overriding royalties. The landowners' royalties and the overriding royalties do not share in expenses of operation, and are entitled to their percentage of the gross production, less only, in the normal case, a *pro rata* share of property taxes and costs of dehydration. The working interest is what is left after payment of these royalties. In this case, it was stipulated that the landowners' royalties were 19.4%. There were no overriding royalties, and there was therefore left a working interest of 80.6% of the total production from the well. The lessee had made assignments of portions of the production to others, who were required to share with it in the payment of operating costs, so that there was in this instance, as frequently happens, a division of the working interest between the lessee and the holders of participating royalties.

The pertinent portion of the assignments is set forth in Findings XVI and XVII. [Tr. 140-142.] A typical one, that to Walter B. Scoville, reads in part as follows:

"That Treasure Company, . . . does hereby sell, assign, set over, transfer and convey to Walter B. Scoville, Nineteen one per cent (19%) participating royalty interests in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises. . . ."

The phrase "participating royalty" is likewise one of art, and the court may take judicial notice that it means simply that the holder of the royalty interest pays his *pro rata* share of the costs of operation. It is clear, therefore, that this phrase does not measure the interest conveyed,

but only defines it. Omitting this phrase, and looking for the measure of the interest conveyed, we find that it is:

“Nineteen one per cent (19%) interests in *all* oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises . . .”
(Emphasis added.)

We submit that on its face this royalty is clear, and conveys what it purports to convey, to wit, 19% of *all* oil and gas produced from the premises, subject to the obligation of the royalty holder to participate in the operating expenses. (This share of expenses would, of course,

1

be — for each 1% of royalty held, since the 19.40% land-
80.6

owners' royalty did not participate in expenses.)

On this view of the case, it is clear that the holder of
1
each 1% participating royalty would be entitled to —
80.6

of the total ward. The trial court took the view that it was equally clear that a holder of a 1% participating

1

royalty was entitled to — of the total award [Tr. 142,
100

153], and would not receive any evidence on the question.

Should this court feel that the assignment is ambiguous, we ask that it take evidence on the point, since evidence is available to show the actual interpretation placed upon the document by the parties. Treasure Company did make payment from time to time on small participating royalties held by two persons whose interests have been acquired by

the R. F. C., and who are not parties to this proceeding. The books of Treasure Company will show how the share of costs and the share of net proceeds were computed.

We submit, however, that the documents are clear, and that after conveying to the various parties to this proceeding 49% of the total production from the well, Treasure Company, which started out with only 80.6% (100% less landowners' royalty of 19.4%) had left only 80.6%—49%, or 31.6% of the total production. It follows that R. F. C., as the successor of Treasure Company, has 31.6%, and the other parties have 49%. It also follows that the money which was awarded for the 80.6% working interest should be divided into 80.6 parts, of which

2	47
— go to the Bullens and Haywards	— go to the other
80.6	80.6

31.6
assignees, and the remaining — go to the R. F. C.
80.6

The award of \$194,500.00 now stands in place of the working interest in the well. Each 1% participating royalty interest is therefore $\frac{1}{80.6}$ of \$194,500.00, or \$2,413.00. The

Bullens and Haywards should, therefore, receive \$2,413.00 each, instead of \$1,917.00 each, which the judgment of the court gave them. [Tr. 153.] This figure, however, is subject to proportionate reduction by the payment of the \$10,000.00 and interest under the two for one agreement, as a prior charge upon the entire award. [Tr. 1232-1233.]

VII.

The Award to the Bullens and Haywards for Their Participating Royalty Interests Should Not Be Reduced by Any Stipulation to Which They Were Not Parties.

Instead of using \$194,500.00, the actual amount of the award, as the amount to be distributed, the court deducted therefrom \$2,800.00, which was the fee of the Master in the accounting action above referred to between The Adamant Company, Walter B. Scoville and G. de Bretteville. [Finding XXVII, Tr. 146-147.] It was stipulated by the parties to that action that the fee should be paid out of the award in this case. The Bullens and Haywards were not parties to the accounting action, and did not enter into the stipulation. Therefore, so far as the Bullens and Haywards are concerned, the award should not be reduced, and any distribution to them should be based on a total award of \$194,500.00.

Conclusion.

For the foregoing reasons the judgment should be reversed and the cause remanded with instructions to the district judge to proceed further in accordance with the opinion of this court.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY, and
FULTON W. HOGE,

*Attorneys for Appellants Herschel Bullen,
Mary H. Bullen, J. C. Hayward and
Mary S. Hayward.*

No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, etc., *et al.*,

Appellant and Respondent,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF LOS ANGELES,
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, *et al.*,

Defendants,

and

RECONSTRUCTION FINANCE CORPORATION, Assignee of TREAS-
URE COMPANY, THE ADAMANT COMPANY, WALTER B.
SCOVILLE, JOE SEEPLER, HARRY WYNN, HERSCHEL BULLEN,
MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Respondents and Cross-Appellants.

Reply Brief of Adamant Company, Walter B. Scoville,
Joe Seeples and Harry Wynn, Appellees.

LELAND J. ALLEN,

1200 Title Guarantee Building,

411 West Fifth Street,

Los Angeles 13, California,

Attorney for Adamant Company, Walter B. Sco-
ville, Joe Seeples, Harry Wynn, Appellees.

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Respondents and Cross-Appellants.

Reply Brief of Adamant Company, Walter B. Scoville,
Joe Seeples and Harry Wynn, Appellees.

Statement of Facts.

In this condemnation action the plaintiffs, United States Government and the Reconstruction Finance Corporation, presented their evidence first before the jury so far as these appellees are concerned.

The Government produced a large map in colors and then, after qualifying their expert witnesses, had them testify only to the "value of the working interests in Treasure Well No. 8."

The map distinctly set out the Fletcher leasehold (containing the well) in its own individual color, and same was pointed out to the jury by the Government witnesses, and same contained only three lots. The Government's expert witnesses testified that a city ordinance required an acre drill site, and hence the three lots were joined up with four lots, but that the royalty paid to the Herndon Community Lease by reason of the joining of the four lots for a drill site was paid to *all* of the *lots* of the Herndon Community Lease and not just the four.

About two years after the drill site was selected there was an action in the Superior Court of the County of Los Angeles, State of California, between Treasure Company, lessee, and these appellees. In that action it was finally adjudicated that Treasure Well No. 8 was located on the Fletcher Lease alone.

The Findings of Fact and Judgment of this Superior Court Action was introduced as Exhibit E into the evidence by these appellees before the jury, and the Government attorneys read considerable portions of said Findings to the jury.

The Government attorneys prepared the final verdict that was submitted to the jury in the case at bar, and the wording of said verdict was as follows:

"H-1-W. I., being the total working interests in Treasure Company Well Treasure No. 8 \$194,500.00."
[R. p. 65.]

At the time that Judge Westover conducted the hearing allocating the jury award, he stated that there was no verdict submitted to the jury by the plaintiff asking for a valuation of working interests in the four lots of G. G. was designated on the map as the Herndon Community Lease, which comprised many lots including the four lots joined as a drill site to the Fletcher Lease.

The Reconstruction Finance Corporation is attempting in its Brief to change the picture placed before the jury and, like the United States Government in its Brief, trying to make it appear that by some process of imagination the jury verdict covers the four lots in G.

The final Judgment of the State Court referred to in the second Question presented by the Reconstruction Finance Corporation in its Brief at page 3, did not attempt to pass upon the four lots of the Herndon Lease.

The Reconstruction Finance Corporation under Question No. 3, page 4, of their Brief referred to a certain State Court Action attacking a Sheriff's Certificate of Sale.

There is nothing in the case at bar to show whether the State Court Action was filed before or after this condemnation suit. If the Counsel for the Reconstruction Finance Corporation looked up the record, he would discover that the State Court Action was filed *after* this condemnation suit was filed.

ARGUMENT.

The Three Questions Set Forth at Pages 3 and 4 of Appellant, Reconstruction Finance Corporation's Brief Are Based on Incorrect Premises and Incorrect Assumptions.

As to Question No. 1, the incorrect assumption is as follows:

“Where a condemnation award is made by a jury for the ‘total working interests’ of a lessee under oil and gas leases covering realty on which a producing oil well is located. * * *.”

The incorrect assumption is that the jury verdict said anything about leases.

The jury verdict prepared by the plaintiff, Reconstruction Finance Corporation itself, read as follows:

“H-1, W. I., being the total working interests in Treasure Company Well Treasure No. 8, \$194,-500.00.”

Since the Reconstruction Finance Corporation is appearing as appellant in two capacities, we do not believe it necessary to re-print what we have already stated in our Reply Brief to the Brief filed by the United States Government and the Reconstruction Finance Corporation as Appellants.

We, therefore, refer to our Argument under the title:

“The picture drawn by the plaintiff before the jury is now binding upon the Government and the Reconstruction Finance Corporation.”

In fact, we believe our Reply Brief to the Government Brief clears most matters in this Brief filed by the Reconstruction Finance Corporation.

Question No. 2 is based on a false premise in that it fails to state that the Final Judgment of the State Court adjudicated that the well was located on *one* lease, to-wit: the three lots known as the Fletcher Lease. The pleadings in the State Court Action set forth the Fletcher Lease only and the State Court Judgment confirmed these appellees' ownership in Treasure Well *on the Fletcher Lease*.

The attempt in Question No. 2 to limit the jury verdict and split it into 3/7 and 4/7 is, of course, contrary to the wording of the verdict itself.

In Question No. 3 the Reconstruction Finance Corporation asked:

“Is it not an improper preempting of jurisdiction on the part of the United States District Court in making distribution of the condemnation award to make a decision involving the ultimate rights of the parties litigant in a State Court Action?”

The above premise assumes that the State Court Action was filed *before* the condemnation action involved in the case at bar.

There is absolutely nothing in the record to sustain such an assumption and, in reality, it is contrary to fact.

* * * * *

The jury verdict in the case at bar was rendered May 13, 1949. The judgment upon the verdict was entered July 13, 1949. The rights of all the parties litigant were fixed by that judgment on the verdict and this *appellant*, the *Reconstruction Finance Corporation*, filed no appeal from that judgment on the verdict.

It is too late for it to question the rights determined by that verdict.

* * * * *

At page 9 the Reconstruction Finance Corporation states in its Brief as follows:

“One of the holdings of the Vickers Judgment was that the plaintiffs in the action, the Adamant Company, Walter B. Scoville and their assigns, lost as of January 31, 1939, their respective interests under the contract in all leaseholds described in the contract other than the leasehold interest on which Treasure Well was located.”

It is very debatable if the Vickers Judgment caused a loss to the Adamant Company and Walter B. Scoville of their interests in the Burns Lease No. 1, the Burns Lease No. 2 and Burns Lease No. 3.

The action in the Superior Court was not one to quiet title upon the Burns No. 1 Lease, nor the Burns No. 2 Lease nor the Burns No. 3 Lease. The action was for an accounting, an injunction and the appointment of a receiver, and the *pleadings* and the judgment *confined* the action to Lots 9, 10 and 11, Block 33 of Tract 9809, as recorded in Book 145, page 91 *et seq.*, of Maps, Records of Los Angeles County, State of California. [Finding II, Paragraph III of Judgment of Adamant's *et al.*, Exhibit “E”; R. p. 449.]

* * * * *

The Reconstruction Finance Corporation on page 9 of its Brief, quotes Paragraph I of the Vickers Judgment, which enjoins the plaintiffs in the State Court action from going upon the said Lots 9, 10 and 11 and does *not enjoin* their going upon any other leases.

There is no Finding or Judgment in the Superior Court case which cancelled the *written assignments* re-

ferred to in Finding XVI made by Judge Westover [R. p. 140].

However, it is not necessary in this appeal to consider or attempt to read into the Superior Court Findings and Judgment made by Judge Vickers any extraneous matter pertaining to Burns No. 1, No. 2, and No. 3 leases, *because the plaintiff in this condemnation action confined the valuation to be made by the jury to the working interests in Treasure Well No. 8 and prepared its form of verdict to such designation only, introduced a large map setting aside the three lots of the Fletcher Leasehold in one individual color, and failed to prepare a jury verdict asking the jury to place a valuation on the four lots of the Burn Sublease, known as G-3.*

Even the Government attorney, Mr. McPherson, distinctly stated that the jury would only value the working interests in Treasure Well No. 8. We quote Mr. McPherson [R. p. 727]:

“Mr. McPherson: If your Honor will recall, the Government’s case was put on *first out of order* to accommodate an absent witness, and at the time the Government’s evaluation witnesses testified we had not as yet settled all of the claims for landowners’ royalty. Accordingly, the Government’s case was *put up in the fashion* that the jury would have been *required* to return their *verdict*, that is, the *value* of the *entire working interest*, and the value of the land owners’ royalty. After those witnesses had testified, and during the progress of the case, the Fletcher and Burns’ claims for landowners’ royalties were settled and have been removed from the case, and the jury will not be required to return a verdict as to them. *The only interest requiring their adjudication is the working interest in Treasure 8.* It would seem to

me, therefore, more expedient and proper and more orderly, no matter what we may have said or done that has caused this confusion, to have their witness evaluate the interest which they claim, which is the working interest in Treasure 8. *That is what the jury's verdict will be.*"

* * * * *

At page 11 the Reconstruction Finance Corporation states in its Brief:

"The jury trial before Judge Beaumont in no way concerned itself with the Vickers Judgment, inasmuch as the issue before the jury was the valuation of the lessees interest in the two leaseholds and the question of the distribution of the award as between the several co-defendants was not placed before the jury."

As Note 6 to the above quotation the Reconstruction Finance Corporation states as follows:

"The Vickers Judgment was mentioned *incidentally* in argument [R. pp. 1079, 1104]."

The above quotations are both incorrect.

As heretofore stated the Reconstruction Finance Corporation and the Government confined the issue of valuation to the "working interests in Treasure Well No. 8," and hence that was the issue placed before the jury by the Government and the Reconstruction Finance Corporation.

The record shows that the Vickers Judgment was mentioned more than *incidentally* in the argument. The word "incidentally" is apparently intended to confuse the Court of Appeals.

The Counsel for the Government mentioned the Vickers Findings and Judgment at least *four* times in his argument [R. pp. 1079, 1088, 1089 and 1090].

At pages 1089 and 1090 the Government's attorney read from the Vickers Findings, and concluded his remark on page 1090 with the statement:

"That is in the evidence before you and you may read it if you care to."

The attorney for these appellees, Adamant Company, Scoville, Seepie and Wynn, stated to the jury in his argument: "You have the Findings and the Judgment, * * *" [R. p. 1103], and then commented upon the Findings and Judgment of the state court.

This same attorney read from the Findings before the jury, as shown on pages 1104, 1105 and 1106 of this record [R. pp. 1104, 1105, 1106].

Another one of the Government's attorneys urged the jury to take the Superior Court Findings and Judgment, Adamant, *et al.*'s Exhibit "E" to the jury room and read it. Said attorney stated:

"You can take that with you and I urge you to do it. *Read it* and see whether or not a single sole predicate laid by Mr. Willis, Dr. Willis, for the use by him of the volumetric method, isn't forever and forever foreclosed by the finding in the case between these people at a time when the Government was not interested, didn't even know it." [R. p. 1146.]

We submit the above quotations at page 11 of the Reconstruction Finance Corporation Brief, are not true as the issue before the jury was the valuation of working interests in Treasure Well (not in two leaseholds), and the Vickers Judgment and Findings were mentioned many times to the jury.

* * * * *

At page 24 the Reconstruction Finance Corporation stated in its Brief that:

“there is no evidence in the record of the valuation trial to support the conclusion that the jury award of \$194,500.00 was for the lessee’s interest in the Fletcher Lease *alone* . . . that there was no testimony offered by any of the co-defendants to refute the fact that the leasehold for Treasure Well is made up of three lots comprising the Fletcher Lease, and four lots comprising the Burns No. 1 Lease.” (This quotation is in substance.)

The defendants offered in evidence the Judgment of the Superior Court, which definitely and finally adjudicated the fact that Treasure Well No. 8 was located entirely on the Fletcher Lease of three lots.

It has not been denied that a city ordinance required at least an acre to constitute a drill *site* and, of course, no testimony was offered by the defendants to refute that situation. But later came the said Superior Court Judgment limiting the well to Fletcher Lease.

* * * * *

At page 25 of its Brief the Reconstruction Finance Corporation states:

“Witnesses for both the Government and the co-defendants testified that the leasehold to be valued by the jury was approximately an acre in size and counsel for the co-defendants in the presence of the jury stated this to be a fact.”

The above statement is misleading. Nobody testified that the leasehold to be valued was an acre in size. It was simply stated that the city ordinance required an *acre drill site*.

However, it was the attorneys for the Government and the Reconstruction Finance Corporation at the jury trial who *pinned down* their expert testimony of valuation to “working interests in Treasure Well No. 8.”

Furthermore, after compliance with the city ordinance as to a drill site there occurred the Superior Court action, placing the well on three lots only.

We adopt Judge Westover’s written opinion upon this point as follows:

“A controversy now arises as to what is included in the leasehold; Treasure Company insists that the leasehold covers both the Fletcher and the Burns No. 1 leases, while Adamant Company and Walter B. Scoville, as assigns contend that the leasehold is restricted to the Fletcher Lease.”

At the jury trial on April 5, 1949, when attempt was made to assess the value of the property of the parties hereto, evidently no thought was given to the fact that value was being established upon the leasehold rather than upon the well. *Most of the testimony concerned Treasure Well No. 8 and the working interest therein.* The jury’s award was designated “working interest, Treasure Well No. 8.” As a consequence, no one took the time or trouble to establish the extent of the leasehold on which the well was located. During the course of the trial a map was introduced in evidence, marked “Plaintiff’s Exhibit 1,” on which various parcels of land were indicated. “H-1 and W-I” were indicated on the map as referring to Lots 9, 10 and 11 of Block 33, Tract 9809, which is the Fletcher Lease. The Burns No. 1 Lease is marked on the map as “G-3.”

Judge Vickers, in his Findings of Fact and Conclusions of Law, found specifically that

“Treasure Company was the owner of an oil well and gas lease on that certain property upon which there was an uncompleted oil well located in the County of Los Angeles, State of California, described as follows:

“Lots 9, 10 and 11 of Block 33, Tract 9809, as per map recorded in Book 145, page 91, *et seq.*, of Maps, Records of Los Angeles County, California.”

He rendered judgment which, in part, enjoined plaintiffs from

“going upon the lease upon which said oil well, ‘Treasure No. 8,’ is situated, which property is particularly described as follows, to-wit:

“All that real property in the City of and County of Los Angeles, State of California, known and described as Lots 9, 10 and 11 of Block 33, in Tract 9809, as per map recorded in Book 145, page 81, *et seq.*, of Maps, records of said Los Angeles County, California.”

When Judge Vickers in his Findings of Fact and Conclusions of Law, and Judgment, referred to Treasure Well No. 8, *it was always mentioned as being upon the Fletcher Lease. No reference was made in either the Findings or the Judgment to any other lease.*

We have reread the testimony given before the jury to attempt to ascertain whether or not the Burns No. 1 Lease was included in the award of \$194,500.00, and we are *unable to find any indication* that the award was given for *any property except the premises known as the Fletcher Lease.* Inasmuch as all the witnesses referred

to the Fletcher Lease as “H-1, W-I.” and it is so marked upon Plaintiff’s Exhibit 1, we must find that the leasehold containing the well, Treasure No. 8, *is the leasehold of the Fletcher Lease* and does not include the Burns No. 1 Lease. (End of quotation from Judge Westover’s opinion.)

* * * * *

At page 30 the Reconstruction Finance Corporation attempts in its Brief to divide the working interests in Treasure Well No. 8 in the proportion of three lots to seven lots.

The Reconstruction Finance Corporation and the Government introduced no evidence to establish the fact that Treasure Well No. 8 was producing any oil from the Burns No. 1 Sub-lease containing four lots, hence there is no substance to their argument that said four lots are entitled to 4/7 of the jury award.

In fact, the Superior Court Judgment, known as the Vickers Judgment, was *res adjudicata* to the effect that *Treasure Well No. 8 was located on the Fletcher Lease alone.*

The writer of this Brief admits that at the time he introduced his Exhibit “E” at the jury trial, the introduction of which occurred *after the Government* and the Reconstruction Finance Corporation had *confined* the valuation of its experts to the “working interests of Treasure Well No. 8,” he then stated:

“This is the complete Findings and Judgment in that case which defines the interests of the Adamant and Scoville [R. 449].”

The statement clearly meant that it defined the working interests of Adamant Company and Walter B. Scoville in Treasure Well No. 8 on the Fletcher leasehold *alone* because that was the basis of the valuation being considered by the jury as put into the evidence by the Government's witnesses *prior* to said statement.

As heretofore stated the Vickers Judgment, in our opinion, did not quiet title to any of the Burns' leases, however that issue is not involved under the jury verdict.

* * * * *

Point 3 at page 32 *et seq.*, the Reconsetruction Finance Corporation in its Brief claims that the District Court should not have preempted the jurisdiction of the California State Court in determining the ownership rights of Harry Wynn in the property condemned, for which condemnation the award stands.

The Record Before the Court Fails to Show That the District Court Preempted the Jurisdiction of the California State Court in Determining the Ownership Rights of Harry Wynn in the Property Condemned for Which the Condemnation Award Stands.

The Complaint in the case at bar was filed September 28, 1942, over nine years ago.

As a courtesy to a fellow attorney, we will attempt to assist the writer of the Brief of the Reconstruction Finance Corporation "solely as assignee." However, in assisting him we are compelled to nullify his Argument Point III contained at pages 32 to 36, inclusive, of his Brief.

The action pending in the Los Angeles Superior Court referred to in Finding XXXVI by Judge Westover

wasn't filed in the Superior Court until June 25, 1943. *This was nearly ten months after the case at bar was filed.*

It is apparent that the case at bar was filed *first* and hence could preempt no proceedings of the State Court.

The question of preempting the jurisdiction of the State Court was fully discussed by counsel for the Government, by the Court and by counsel for Adamant Company. Scoville, Seepie and Wynn, in the jury trial.

For such discussion we refer this Court to the printed record, pages 893, 894, 895 and 896.

At page 895 we quote what Judge Beaumont stated:

“The Court: It is true, as Mr. Allen states, that all of the property of value within this area has been condemned, and *this is the time* for the defendants to present their evidence showing their interests. The Court would either have to pass upon it, even though it is the subject of litigation in the State Court, or would have to suspend the proceedings without prejudice to the defendant until the determination in the State Court. That was one of the things that the Court had in mind. The Court would be reluctant to do that without the consent of the defendant.”

Furthermore, the same point was again raised and discussed by the Government counsel, the Court and counsel for Adamant Company, Scoville, Seepie and Wynn.

For discussion of said point see the following pages of this printed record: Pages 917, 918, 919, 920 and 921. The following is part of such discussion:

"The Court: Mr. McPherson, Mr. Wynn has been made a defendant in this action?

Mr. Allen: Against his will.

Mr. McPherson: Yes.

The Court: Why did you make him a defendant?

Mr. McPherson: That I could not tell you, sir. I did not draw the original petition.

The Court: *Well, you are here now to explain it.*

Mr. McPherson: He was in the category, I should say, of some four or five hundred other individuals who were named parties defendant in this case, whose interests have been mentioned to your Honor, and have no interest in the proceedings, and nothing has been done about it. In other words they were improperly joined. Why they were joined, I am not prepared to say, because that was some two or three years before I came here.

The Court: You think they were improperly joined?

Mr. McPherson: Yes, your Honor, I do.

The Court: *Do you move to dismiss the action then as to Mr. Wynn.*

Mr. McPherson: *No.*

The Court: Well, if they were improperly joined why should he not be dismissed?

Mr. McPherson: Because we are now on notice that he claims an interest, and I would not dismiss

a suit against any one who claims an interest simply because I do not think he has one.

The Court: *Well, the Government is responsible for the action?*

Mr. McPherson: *For having joined him, yes."*
[R. pp. 917-918.]

The State Court Action referred to above was for an accounting on Harry Wynn's 6 per cent royalty, to set aside the fraudulent execution sale of one of the 2½ per cent royalties [R. p. 750], and contained a quiet title cause of action and a cause of action for money had and received.

We submit that the record before this Court fails to show that the State Court Action preceded the case at bar.

Had the authors of the Brief for the Reconstruction Finance Corporation solely as Assignee of Treasure Co., been present at the jury trial they would have observed that this question was raised by the Government attorneys and that Judge Beaumont, sitting with the jury, did not suspend actions for the purpose of requiring the said State Court action to proceed. The Counsel for the Reconstruction Finance Corporation failed to cite any authority to the effect that the Federal Court lacked jurisdiction in passing upon whatever interest Mr. Wynn had in the properties being condemned. In fact, Judge Beaumont permitted the introduction into the evidence of documents which sustained Mr. Wynn's interests, and Judge Westover simply followed this procedure and permitted further testimony as to those interests.

We do not deem it necessary to comment on the cases cited by the Reconstruction Finance Corporation under their Point 3, as their quotations from said cases clearly show no denial of jurisdiction in the Federal Court to pass upon Mr. Wynn's interest in the condemnation matter.

Conclusion.

1. Judge Westover's decision that the jury award was for total working interests in Treasure Well No. 8, and that this stands for working interests in the Fletcher Lease alone and not in the Burns No. 1 Sub-lease, should be affirmed.

2. The Adamant Company is entitled to 25/80.6 per cents of the jury award; Walter B. Scoville is entitled to 16/80.6 per cents of the jury award, and Harry Wynn is entitled to 6/80.6 per cents of the jury award.

3. That the District Court did not preempt the jurisdiction of the California State Court in determining the ownership rights of Harry Wynn, but that said District Court had jurisdiction to settle all rights and interests of all litigants in the property being condemned by reason of the fact that they were brought into the action by the Government and Reconstruction Finance Corporation, and were thereby compelled to establish their interests.

Respectfully submitted,

LELAND J. ALLEN,

Attorney for Adamant Company, Walter B. Scoville, Joe Seeple, Harry Wynn, Appellees.

No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD
and MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; UNITED STATES OF AMERICA and
RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Reply Brief of Adamant Company, Walter B. Scoville,
Joe Seeples and Harry Wynn, Appellees.

LELAND J. ALLEN,

1200 Title Guarantee Building,
411 West Fifth Street,
Los Angeles 13, California,

*Attorney for Adamant Company, Walter
B. Scoville, Joe Seeples and Harry
Wynn, Appellees.*

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Joe Seeples and Harry Wynn, Appellees.

Statement of Facts.

Findings XXIV and XXV [R. 145, 146] correctly state the facts: That to obtain funds to complete the well, Walter B. Scoville entered into an agreement with Herschel Bullen and wife and J. C. Hayward and wife, whereby the Bullens and the Haywards agreed to contribute, and did contribute, \$2,500.00 per couple to be used in completing the well, and said money was so used, and in consideration of such advancement of funds, Walter B. Scoville agreed to assign to each couple a one per cent interest. Said Scoville agreed with said parties that

the sums so advanced were to be repaid to them "two for one." The assignments from Walter B. Scoville to the Bullens and Haywards were assignments of the leasehold and not of only oil produced, saved and sold.

Walter B. Scoville agreed to return the money advanced by the Bullens and the Haywards "two for one" out of the first 15 per cent of gross production of the well. This agreement was made for the sole purpose of obtaining sufficient money to complete the well.

The plan as evolved by Walter B. Scoville was approved by the Adamant Company and the Treasure Company. The Treasure Company and the Adamant Company consented to the transferring of a part of said Scoville's interest, and agreed that said Scoville could raise the necessary finances as proposed.

Neither the Treasure Company nor the Adamant Company executed said agreement between Walter B. Scoville and the Bullens and the Haywards as parties, nor were said Treasure Company nor the Adamant Company parties thereto, nor were said Treasure Company nor the Adamant Company bound thereby.

The appeal by Bullen and Hayward involves the following points:

1. Whether or not an agreement to pay a bonus of "two for one" out of oil constitutes a royalty.
2. Whether or not said bonus agreement created an equitable lien, or simply a personal contract between Bul-

len and Hayward and Walter B. Scoville with no liability on the part of Treasure Company or Adamant Company.

3. Whether or not said bonus contract created any lien against the interests of Walter B. Scoville, or any other claimants, of moneys due under the award.

4. Whether or not the working interests were alone covered by the jury verdict, and hence said jury award should be divided equally among the working interests of 80.6 units and not into 100 units, which latter division gave Treasure Company more than it really owned.

5. Whether or not the portion of the jury award belonging to the lessee and operator (or his belated assignee) is subject to an equitable lien for funds due the owners of working interests who received none of the net profits of the well by reason of said lessee and operator refusing to pay over said profits.

6. Whether or not the court erred in reducing the award by the amount of the Master's fee in the Accounting case, insofar as that deduction applies to Bullen and Hayward.

ARGUMENT.

At page 15 of the Bullen and Hayward brief there is this statement:

“The Two for One Agreement is a royalty.”

The Two for One Agreement could *not possibly be* a royalty because there are only one hundred oil royalties in a lease.

In the case at bar the landowners’ royalty amounted to 19.4 units. [R. 746.]

The working interests amounted to 80.4 units.

This comprised all of the *possible royalties* that could be outstanding upon this leasehold.

The Two for One Agreement is *simply a contract* but not a royalty.

There is a vital distinction between the assignments construed in the case of *Recovery Oil Co. v. Van Acker*, 79 Cal. App. 2d 639, and the same case found later in 96 Cal. App. 2d 909. (Cited pp. 15-20 of Bullen and Hayward brief.)

The *assignments* construed in those two cases read as follows:

“On November 20, 1928, A. Bruce Frame and his wife executed the following written assignment:

“That, referring to that certain Oil and Gas Prospecting Permit, Visalia Serial 010101, M. A. Knapp, Assignee, and referring to the Operating Agreement dated May 2, 1928, executed by said M. A. Knapp to the undersigned, covering the following described premises: (Description.)

“The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen

percent (15%) of the oil, gas and other hydrocarbon substances produced, saved and sold from the said premises so covered by said Operating Agreement (less amount used in operations on the premises), until such time as said assignee shall have received the sum of Twenty Thousand Dollars (\$20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end."

On April 10, 1929, N. E. Grable executed the following instrument:

"IN CONSIDERATION of the receipt, by the undersigned, of Ten and no/100 (\$10.00) Dollars, N. E. Grable, unmarried, of Los Angeles County, State of California, does hereby remise, release, assign and Quitclaim to ADA M. CRAWFORD of Los Angeles County, State of California, the following: *This instrument is intended to transfer all right, title and interest now held by the Grantor* in and to one half ($\frac{1}{2}$) of the interest acquired by the Grantor under that certain instrument dated November 20, 1928, and recorded November 27, 1928, in Book 272, Page 431 of Official Records of Kern County, California, without any warranty or assurance of title whatsoever." (Emphasis added.) (P. 640 of 79 Cal. App. 2d.)

In the *Van Acker* case, *supra*, the interest created by the assignments constituted a direct proportion of the oil, gas and other hydrocarbon substances.

The second assignment above, being the one from Grable to Crawford, states:

"This instrument is intended to transfer all right, title and interest *now held* by the grantor * * *."

Bullen and Hayward received two units of royalty out of the total of 100 units possible in an oil lease *at the time* they paid their money. Such being the case the contract to pay for "Two for One out of oil" was in the nature of a bonus and, of course, their 2 per cent royalty was benefited by their investment just as much in proportion as the other 98 unit holders in the leasehold.

Furthermore, in the *Van Acker* case the 15 per cent royalty *was included* within the 100 per cent or 100 units of royalty in the leasehold.

We quote from page 910 of the Final Decision of *Recovery Oil Co. v. Van Acker*, 96 Cal. App. 2d 909, as follows:

"Various partial assignments of said lease were made to others and in 1938, the plaintiff became the owner of Knapp's *remaining interest* in this lease insofar as it pertained to the land here involved."

The above quotation indicates in using the words "remaining interest in this lease" that such remaining interest referred to the difference between the outstanding per cents and 100 per cent.

We again quote from the final decision in the *Van Acker* case as follows (96 Cal. App. 2d 909-911):

"A judgment in favor of the plaintiff was reversed on appeal (*Recovery Oil Co. v. Van Acker*, 79 Cal. App. 2d 639 (180 P. 2d 436)) for reasons not involved here. After a retrial the court found, so far as material here, that the oil and gas lease given to Knapp in 1930 was subject to the *operating agreement* between Knapp and Frame, and to the *assignments above referred to* from Frame to Grable and from Grable to Ada M. Crawford; that the plaintiff

became the owner of so much of Knapp's *interest* in the *property* as remained *after* these transfers and assignments; that each of these transfers and assignments were duly recorded and plaintiff had constructive notice thereof; and as a conclusion of law, that the plaintiff's lease, insofar as this property is concerned is subject to a valid assignment now held and owned by Ada M. Crawford whereby she is the owner of 15 per cent of the proceeds of the oil etc., saved and sold from the premises until such time as she shall have received \$10,000.00, whereupon her interest shall terminate and be at an end. Judgment was entered accordingly. The plaintiff appealed from the entire judgment, but prosecutes this appeal only from that portion thereof which sustains the claim of Ada M. Crawford." (Emphasis added.)

The above clearly indicates that there can be no royalty interests in excess of 100 per cent or of 100 units.

When Bullen and Hayward received the written assignment of one per cent each said assignment read, in part, as follows:

"* * * sell, assign, set over, transfer and convey to Herschel Bullen and Mary H. Bullen as joint tenants * * * one per cent participating royalty interest in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises, * * *." [See Finding XVII; R. 141.]

Bullen and Hayward knew by *comparing* their respective assignments of a one per cent participating royalty with the *bonus* contract that the two were *entirely different* and that while the one per cent assignment of a royalty gave them an equitable lien, as it transferred to them a

capital *investment* in the production of oil and gas the bonus contract gave them no such rights.

Each contract is governed by the intent of the parties to said contract.

This bonus contract was never intended to be a participating royalty interest, otherwise it would have been so worded.

Bullen and Hayward quote from the case of *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, at page 18 of their brief.

The basis of the decision in said case was an oral grubstake agreement, such agreements having always given the party who grubstaked the other party a definite interest in the “*res*” or property obtained.

We quote from the *Austin v. Hallmark Oil Co.* case:

“On November 2, 1934, in accord with the *obligation imposed* by the grubstake agreement of July 1st, Porter assigned to Austin one-half of all income, profits, moneys and credits to become due or payable to him under the terms of his contract with the Hallmark Oil Company, Inc.” (P. 723.)

* * * * *

“The interest created by an assignment depends upon the *intention of the parties* (La Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132 (114 P. 2d 351, 135 A. L. R. 546); National R. Co. v. Metropolitan T. Co, 17 Cal. 2d 827 (112 P. 2d 598); Callahan v. Martin, 3 Cal. 2d 110 (43 P. 2d 788, 101 A. L. R. 871)), and while that intention is determined primarily from the terms of the instrument, the language of the assignment must be construed in the light of

the facts and circumstances of the particular case. (Schiffman v. Richfield Oil Co., 8 Cal. 2d 211 (64 P. 2d 1081); Adamson v. Paonessa, 180 Cal. 157 (179 P. 880).) (13) In view of this rule it is clear that the instrument in the present case was intended to transfer fifty per cent of the interest retained by Porter under the agreement of October 30th, regardless of the nature of that interest. *By virtue of the grubstake agreement*, Austin was equitably entitled to such a share, and since the intention to confer rights different from those previously held is not manifested by the terms of the assignment, it must be assumed that Porter intended it to fulfill the obligations *of his trust.*" (P. 730.) (Emphasis added.)

Austin v. Hallmark Oil Co., 21 Cal. 2d 718, 723, 730.

The *Hallmark* case clearly holds that the assignment of a right created by a grubstake agreement carries the interests obtained by the grubstake agreement.

A bonus contract is not in the same category as a grubstake agreement.

It was stipulated that the proceeds from the production of the oil well, amounting to \$205,411.68, was handled by the Treasure Company. [R. 1236.]

Neither Mr. Scoville nor the Adamant Company received a penny of said production moneys.

The United States Supreme Court has definitely ruled that a contract such as this one (whether we call it a bonus or not), does not create an equitable lien.

In the case of *Helvering v. O'Donnell*, 303 U. S. 370 (1937), the Supreme Court said:

“The question is whether Respondent had an interest, that is, a capital investment in the oil and gas in place.”

The case turned upon the point that:

“The agreement to pay Respondent one-third of the net profits derived from the development and operation of the properties was a *personal* covenant and did not purport to grant Respondent an interest in the properties themselves. If there were no net profits, nothing would be payable to him. No trust was declared by which Respondent could claim an equitable interest in the *res*.” (303 U. S. 372.)

The Appeals Court of California denied an equitable lien in a similar contract situation.

We quote:

“The complaint was based upon a written instrument alleged to have been executed by John Weston Havens in 1903 in words and figures as follows:

“ ‘Berkeley, Cal. Jan. 6th, 1903.

“ ‘To whom it may concern, and especially my executor—

“ ‘It is agreed that I shall pay out of the sale of Block 22 Shattuck Tract number 5, the macadamizing bill of \$617.41 and grading bill of \$349.72.

“ ‘J. W. Havens.’

“From the prayer of the complaint and the briefs, it appears that plaintiff was seeking to have it declared that said instrument created an *equitable lien* upon said real property and upon the proceeds of any

sale of said property which might be made at any time.

“(1) Appellant contends that his complaint stated a cause of action for such declaratory relief and that the trial court erred in sustaining the general demurrer thereto. *We find no merit in this contention.* The instrument in question manifests no intention to create a lien upon the real property. It appears to be an informal memorandum executed for the purpose of evidencing the personal obligation of the maker. Said obligation was to be paid by the maker or his executor, to whom a claim might be presented, but payment was deferred until the time of sale of the property. At most it was a mere agreement to pay a debt out of a particular fund, when received, but *such an agreement does not create a lien even upon such fund.* (Maier v. Freeman, 112 Cal. 8 (44 Pac. 357, 53 Am. St. Rep. 151); 37 Cor. Jur., p. 314, sec. 15; also, p. 318, sec. 21.)” (Emphasis added.)

Morrison v. Havens, 24 Cal. App. 2d 504 (1938).

(Supreme Court denied petition for hearing March 25, 1938.)

The mere fact that Bullen and Hayward received an assignment of 2 royalty units put them on notice that their contract calling for two for one out of production was not a royalty interest but a plain contract for a bonus.

We cannot agree with Bullen and Hayward that:

“The Van Acker case is, therefore, on all fours with the case at bar, * * *.” (Br. p. 19.)

We submit:

The Two for One Agreement is not a royalty agreement.

* * *

At page 22 the Bullen and Hayward brief states:

“The two for one agreement is binding on all owners of the working interests.”

It has been stipulated in the case at bar that Treasure Company handled all of the proceeds from the production of the well prior to the time of its seizure by the Government in the condemnation proceedings. [R. pp. 1235-1236.] In view of that fact, if any one is liable for the payment of the two for one, it would be the Treasure Company alone.

Other owners of working interests did not become liable under the contract. They acquired their interests and paid for same without any obligation to pay any bonus.

In *First National Finance Corporation v. Five-O-Drilling Co.*, 209 Cal. 569, the Court states:

“The transaction leading to the institution of this suit having been carried on by Kelley in the *ordinary course* of the business of the appellant, it may not now *deny his authority* in the premises.”

Naturally the Supreme Court ruled as quoted at page 24 of the Bullen and Hayward brief.

We submit that appellants have failed to show any contract pledging any working interests as collateral for the fulfillment of the two for one agreement. *Hence no working interest is liable under the bonus contract.*

* * *

Bullen and Hayward state at page 27 of their brief as follows:

“The two for one agreement is at least a charge on the interest of Walter B. Scoville.”

We fail to find in the record any pledge of the interests of Walter B. Scoville as guaranteeing fulfillment of the Two for One Agreement.

In view of the fact that Walter B. Scoville handled *none* of the proceeds from the production of oil there can be no lien upon any of his interests, since *he* did not misapply any of the proceeds.

Gapes v. Salmon, 35 Cal. 576, 587, 588 (cited p. 28 of the Bullen and Hayward brief), held as follows:

“The rule upon this point is, that one tenant in common cannot convey any specific part of the land so as to prejudice his co-tenant.” (Cases cited.) (P. 587.)

In the case at bar Scoville did not convey anything in the bonus agreement hence the citation of the above case is not in point *even by analogy*.

We submit that any interests held by Walter B. Scoville were free from any pledge as collateral and hence not chargeable with the two for one bonus agreement.

* * *

At page 28 Bullen and Hayward state in their brief as follows:

“The Appellants Bullen and Hayward and other holders of *participating royalties* have an equitable lien upon the interest in the well of the lessee, Treasure Company, to secure the payment to them of their share in the net proceeds of operation.”

The Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn agree fully with the above contention as to the 2 per cent participating royalty belonging to Bullen and Hayward and respectfully refer this Court to their Opening Brief *as appellants* where the equitable lien is fully discussed at pages 28 to 44 inclusive of said brief.

* * *

At page 36 of the brief Bullen and Hayward state:

“The Reconstruction Finance Corporation, as the successor of Treasure Company, is bound by the lien.”

We agree fully with his and refer the Court to the above reference of our Opening Brief as Appellants.

* * *

We also agree with the statement of Bullen and Hayward at page 36 of their brief, reading as follows:

“Appellants Bullen and Hayward are entitled, by virtue of their ownership in the aggregate of a 2 per cent participating royalty to receive 2/80.6 of the award.”

These appellees refer this Court to their Opening Brief as Appellants, and specifically to pages 16 to 27 thereof discussing this same situation.

Conclusion.

As to the appellants Bullen and Hayward:

1. They are entitled to an equitable lien against any funds to be allocated to Treasure Company or its belated assignee Reconstruction Finance Corporation, to the extent of 2 per cent of \$205,411.68 less cost of operation and *less any moneys heretofore received* by them from Treasure Company, as shown by the evidence before Judge Westover.

2. Bullen and Hayward are entitled to no equitable lien against any funds by reason of their bonus contract, as said alleged contract gave them no interest in the “*res*” as stated by the United States Supreme Court in *Helvering v. O'Donnell*, 303 U. S. 370.

3. It is the “*res*” that was distributed by the trial court and Bullen and Hayward have no claim or lien upon any of the “*res*” except 2 per cent thereof.

Respectfully submitted,

LELAND J. ALLEN,
*Attorney for Adamant Company, Walter
B. Scoville, Joe Seeple and Harry
Wynn, Appellees.*

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Appellees.

Brief of Appellees, Herschel Bullen, Mary H. Bullen,
J. C. Hayward and Mary S. Hayward.

WILLIAMSON, HOGE & CURRY,

FULTON W. HOGE, and

EDWARD M. PATTERSON,

417 South Hill Street,

Los Angeles 13, California,

*Attorneys for Appellees Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward.*

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PAUL P. O'BRIEN

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Appellees.

Brief of Appellees, Herschel Bullen, Mary H. Bullen,
J. C. Hayward and Mary S. Hayward.

Introductory Statement.

Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward, who have heretofore filed their opening brief as appellants in this case, submit this brief as appellees in the appeals taken by the other parties to the action.

In so far as the opening brief of the appellants Adamant Company, Walter B. Scoville, Joe Seeples and Harry Wynn is concerned, these appellees have only one point to make, and that is that on page 4 there is an error in the statement of the case. We refer to the following statement:

“That the United States Government, Reconstruction Finance Corporation, Treasure Company, Mr. and

Mrs. Bullen and Mr. and Mrs. Hayward did not file any petition for distribution of compensation in the condemnation award made by the jury."

A petition for distribution of the share of the award to which they are entitled was duly filed by the Bullens and Haywards [R. 101]. Apart from the foregoing, these appellees join in the arguments made by the opening brief of said appellants.

The brief of the United States may be disposed of by pointing out that it raises a moot question.

The Government makes the erroneous assumption that the Beaumont judgment put a value on the lessee's interest in the Fletcher and the Burns No. 1 leases, refers to the erroneous finding by Judge Westover that the Beaumont judgment valued the lessee's interest in the Fletcher lease, and then says, at page 17 of the brief:

"Since it is clear that under these findings the judgment based thereon stands as an adjudication that the United States has not paid for the Burns No. 1 leasehold, *thus exposing the Government to this further liability*, the Government filed a motion to vacate those findings . . ." (Emphasis added.)

This is a fallacy in the Government's brief. It is not exposed to any further liability.

The parties to the condemnation action are bound by the Beaumont judgment, whatever it means. They have all had their day in court, and cannot come back upon the Government for any further claims relating to the Burns No. 1 lease, the Fletcher lease, or any of the other property condemned.

As to persons, if any, who are not parties to the action, and who might have an interest in either lease, they have

long since been barred by the statute of limitations from asserting any claims for compensation on account of the taking of such interests. An order of possession was made in the condemnation case on September 28, 1942 [Finding V, R. 137]. A Declaration of Taking was filed by the Government on October 26, 1942 [R. 73]. The statute of limitations on actions to recover for property taken by the United States is six years (28 U. S. C. A. 2401). This section reads in part as follows:

“Sec. 2401(a). Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”

The brief of the R. F. C. is based in part upon the same erroneous interpretation of the Beaumont judgment, *i. e.*, the assumption that it values the Fletcher and Burns No. 1 leaseholds. It further assumes, without support in the record, that the valuation should be distributed between the two leases on the basis of the number of lots covered by each, and assigns 3/7ths of the value to the Fletcher lease, it covering three lots, and 4/7ths to the Burns No. 1 lease, it covering four lots. The R. F. C. interprets the Vickers judgment as limiting the royalty holders to an interest in the Fletcher lease. From these three premises it reasons that the royalty holders have a percentage in only 3/7ths of the entire award. The reasoning is sound, but the premises, or at least, the basic premise that the Beaumont judgment values leases, are incorrect.

Summary of Argument.

It is the position of the appellees Bullen and Hayward that upon the termination of the agreement of April 5, 1938, their assignor, Walter B. Scoville, had left only a participating royalty in one well, Treasure Well No. 8; and, therefore, that if any other wells could have been drilled upon either the Fletcher lease or the Burns No. 1 lease, they would not share in such wells; that the Beaumont judgment valued the property in which appellees had an interest, to-wit, the working interest in Treasure Well No. 8; that the entire award of \$194,500.00 was given for that interest only; that if any interest in either lease was left unvalued, no one was hurt thereby, because the R. F. C. succeeded to all interest of the lessee under both leases, and, as noted above, no claim can now be made against the Government; and that the question of what rights the holders of royalty interests in the one well might have in either lease is academic, because the only right that could be of value would be the right to drill wells, and no additional wells could be drilled on either lease; that the Vickers case is, therefore, immaterial and it is also immaterial as far as these appellees are concerned; because they were not parties to the action.

Argument.

The participating royalty interests involved in this case were created by the agreement of April 5, 1938, between the R. F. C.'s predecessor in interest, Treasure Company, therein referred to as First Party, The Adamant Company, referred to in the agreement as Second Party, and Walter B. Scoville, therein termed Third Party [Treasure Company's Ex. QQ in this proceeding].

The agreement shows that while the well was drilled upon the Fletcher Lease, the Burns No. 1 Lease had been combined with it as a drill site, presumably because there was not enough area in the Fletcher Lease to meet the legal requirements for a drill site. In any event, Treasure Company owned both leases, and they were so combined. The agreement contains the following paragraph in the preamble:

“WHEREAS, First Party has acquired an Oil and Gas Sub-Lease from Robert S. Burns and Sarane Otis Burns, his wife, covering Lots Seven (7), Eight (8), Thirty-five (35) and Thirty-six (36) in the above described Block and Tract, which said Sublease it is proposed to combine with the above mentioned Fletcher lease into one drillsite; and”

Another part of the preamble reads as follows:

“WHEREAS, First Party now desires to complete said well on the Fletcher lease and the Burns No. 1 lease, and to drill a second well on Burns No. 2 lease, and its third well on Burns No. 3 lease . . .”

The agreement further provided that Second Party, the Adamant Company, and Third Party, Walter B. Scoville, were to have a participating royalty in the various leases.

On page 4 it was specified that they were to get royalties as follows:

- “(a) To Second Party, a twenty-five per cent (25%) participating royalty interest on all of the above described leases.
- (b) To Third Party a participating royalty interest of nineteen percent (19%) to the Fletcher and Burns No. 1 lease if the well is completed for less than one thousand (1,000) barrels,”

Finally, there was a provision on page 5 for termination, as follows:

“It is also understood that should the first well be completed for two hundred (200) barrels per day or less, this contract shall terminate, and Second Party and Third Party will thereupon quitclaim to First Party all of their interests hereunder, *except as to such first well.*” (Italics ours.)

The first well, Treasure Well No. 8, was completed for less than 200 barrels per day, so that this clause became operative. The result was that while the parties started out with an interest in *leases*, they wound up with an interest *in a well*.

The *Vickers* case was a suit brought by Walter B. Scoville, The Adamant Company, and their assignees, J. O. Seepie and Harry Wynn, as plaintiffs, against G. de Bretteville and Treasure Company, a corporation, as defendants. The complaint was filed on June 1, 1939, and the judgment was rendered on November 27, 1940 [Finding III in this proceeding, R. 136]. Long before the complaint was filed, Walter B. Scoville, one of the royalty

holders under the agreement, and one of the plaintiffs in the *Vickers* case, made an assignment of two 1% participating royalty interests to the appellees Bullen and Hayward, and notice thereof had been given to the lessee, Treasure Company. These assignments were executed October 22, 1938 [Ex. 2 of petitioners Bullen and Hayward]. An application filed with the Commissioner of Corporations under date of September 30, 1938, asking for consent to transfer the royalties in escrow, was signed by Treasure Company, thereby establishing its knowledge of the assignment [Ex. 2 of petitioners Bullen and Hayward]. After this, the Bullens and Haywards, as holders of the assigned participating royalties, looked to Treasure Company, the operating lessee, for payment of their royalties, and no litigation thereafter taking place between the assignor, Scoville, and Treasure Company, to which these appellees were not parties, could change their rights.

Since the *Vickers* case cannot affect the rights of the appellees Bullen and Hayward, we will leave to counsel for Walter B. Scoville further discussion of that case. We may point out, however, that if we are right in the argument that the Beaumont judgment valued only the working interest in Treasure Well No. 8, then the *Vickers* case is immaterial in any event. The only purpose it serves is as a prop to the argument of the R. F. C. If, as the R. F. C. contends, the Beaumont judgment valued the Fletcher Lease and the Burns No. 1 Lease, then they have to rely on the *Vickers* case for their proposition that the royalty holders had no interest in the Burns No. 1 Lease. If, on the other hand, the entire award of \$194,500.00 was given for the working interest in Treasure Well No. 8, and for that only, then whether or not the royalty holders had any interest in the Burns No. 1 Lease

is of no consequence. It is conceded by everyone that they did retain their interest in Treasure Well No. 8.

On the question of the *Vickers* judgment, while the Bullens and Haywards are not bound by the finding which Judge Vickers made that the well was brought in for less than 200 barrels per day, they concede this to be the fact, and therefore concede that their rights as participating royalty holders, which were derived from the rights of Walter B. Scoville under the April 5, 1938, agreement, were terminated, except for the continuing interest in the one well, Treasure No. 8. The nature of that interest, however, is a matter for the decision of this court, and is not in any way affected by the Vickers judgment.

In the case at bar, Judge Westover held [1st Par. Finding IV, R. 151], that the participating royalty assignments constituted an interest in real property, and this conclusion has not been questioned by anyone. It may not be amiss, however, to point out that it is squarely supported by the decision of the California Supreme Court in the leading case of *Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081.

In that case the owners of an oil lease sold participating royalties in order to finance the drilling of a well. As said by the court at page 217:

“The participating agreements gave the purchaser a right to share in the proceeds of production from one well only”

The lease was sold to Richfield Oil Co., which the court found was chargeable with knowledge of the outstanding agreements. The company contended, among other things, that the participating oil agreements were only the personal obligations of the issuer (p. 214). The court held

that the royalty holder had an interest, which was not an undivided interest in the lease, and which it refused to define, but which would run against a purchaser of the lease with notice (p. 227).

The effect of this holding is necessarily that such a royalty holder has a property interest, and the case has been cited to that effect many times, *e. g.*, *Recovery Oil Co. v. Van Acker*, 79 Cal. App. 2d 639 at 642, 180 P. 2d 436 at 438; *La Laguna Ranch Co. v. Dodge*, 18 Cal. 2d 132 at 138 and 139, 114 P. 2d 351 at 355.

If the holders of the participating royalties in Treasure Well No. 8 had an interest in real property, as the California law clearly establishes, it was the duty of the Government to pay the fair market value of that interest when it was taken as a result of the condemnation of the fee, and this brings us to the question of what the Beaumont judgment means.

In the jury's verdict which is incorporated in the Beaumont judgment, there are two columns. One is headed "Interest." In this column are listed a description of the various interests in the property condemned. (The Government, of course, condemned the fee simple absolute in all the property, including the premises covered by the Fletcher and the Burns No. 1 leases, but the jury valued the separate interests in the various properties.) [R. 69-72.] There is a second column headed "Fair Market Value," under which the value of each interest is set forth opposite the description thereof. The description of the item with which we are concerned, and the value assigned to it, are, respectively, as follows [R. 71]:

"H-1—Being the total working interests

W-I in Treasure Company Well

Treasure No. 8

\$194,500.00"

The foregoing language would seem to dispose of any argument as to what the symbols "H-1" and "W-I" mean. They are specifically defined by the judgment itself as the total working interest in Treasure Company Well Treasure No. 8. This working interest is, of course, made up of the rights held by the various participating royalty holders and the remaining portion held by the lessee, Treasure Company, the predecessor in interest of the R. F. C.

We submit that there is no reason to look further than the face of the judgment for its proper interpretation. In this connection, it is to be noted that the parol evidence rule applies to judgments as well as to other documents. A good general statement of the rule is to be found in 49 Corpus Juris, Section 863, where it is said:

"If the language used in a judgment is ambiguous there is room for construction, but if the language employed is plain and unambiguous there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used."

Another good statement is found in *Harrison v. Manvel Oil Co.*, 180 S. W. 2d 909, where the court says at page 914:

"Practical consideration supports the conclusion that an unambiguous description in a judgment affecting land should not be open to contradiction or interpretation by examination of the evidence admitted at the trial."

The judgment given by Judge Beaumont which valued the property was entered July 13, 1949 [R. 79], and has long since become final. Yet the Government and the

R. F. C. ask this court to review a lengthy record to determine what the witnesses meant when they testified concerning the value of certain property mentioned in the judgment. That burden should be imposed upon the court only if there is ambiguity in the judgment.

This is true whether the judgment is right or wrong. An examination of the testimony of the expert witnesses which is summarized in the briefs of the R. F. C. and the Government will show, however, that there is no error in the judgment. These experts gave their opinions as to the value of the well, and that only. They arrived at it by estimating the remaining amount of oil and gas which could be produced from that one well, and deducting the estimated expenses, which included the payment of landowners' royalty to the two landowners under the Fletcher and the Burns No. 1 leases. There is not a word in their testimony to indicate that they had in mind any values which might be reached by other wells, or even to indicate a possibility that other wells could be drilled on either lease.

On the contrary, the Government's star witness, Dr. Dodge, testified specifically that he was not considering any other values. On direct examination, he indicated that he was valuing the same thing which the jury and the judgment ultimately valued, to-wit, the working interest in Treasure Well No. 8. He says [R. 307]:

"I have placed upon the map the symbol: H-1 Working Interest, to designate the value which I have given is the working interest in the Well Treasure 8 located on Parcel H."

On cross-examination by the defendant Johnson, Dr. Dodge testified as follows [R. 350]:

“Q. (By Mr. Johnson): I don’t know whether I asked this question or not, but did you in evaluating any of the interests in H-1 give consideration to the possibility that additional wells might be drilled on the lease? A. No, we did not. That is a lease of one acre and no additional wells could be drilled on the lease within the law.

Q. At the point of take-over would you have given consideration to the prospect that additional wells would be drilled on that lease that was a part of the value as of that date?”

* * * * *

“The Court: Can you answer the question, Mr. Dodge? [R. 352.]

The Witness: It is impossible to answer the question because the lease in question consisted of one acre only and under the law of the State of California no additional wells could be drilled.”

The testimony continued, and showed that the one acre of which the witness spoke was the area both of the Fletcher lease and the Burns No. 1 lease, though the witness does not refer to it as Burns No. 1 at this point. He does give the lot numbers, however, Lots 9, 10 and 11 being the Fletcher lease, and Lots 7, 8, 35 and 36 being the Burns No. 1 lease [Finding I, R. 135], and he does refer to the map designation of the Burns No. 1 lease, G-3 [Finding X, R. 139].

Dr. Dodge's testimony continued as follows [R. 352]:

"Mr. Johnson: I don't know the area of the entire lease.

The Witness: The area is slightly under 50,000 square feet.

Q. (By Mr. Johnson): Is that the entire lease?

A. That is the entire lease of both the Fletcher lease and the Herndon Development lease. They comprise slightly under 50,000 square feet. My recollection is 47,000-some odd square feet.

Q. Mr. Dodge, I will show you Johnson's Exhibit A for identification, being an assignment of participating royalty and call your attention to four paragraphs of descriptions and ask you whether or not the first two smaller paragraphs alone relate to the acre upon which Well No. 8 is drilled? A. Yes. That is correct, the first two. The first paragraph contains Lots 9, 10 and 11 and refer to the so-called Fletcher parcel which has been labeled H. The next paragraph includes Lots 7, 8, 35 and 36 and refers to the four additional lots which I believe have been labeled G-3, if I am not mistaken.

Mr. McPherson: That is right.

The Witness: And those are the lots and comprise the entire lease upon which the Treasure well was drilled."

The statement of the witness that it was impossible to drill additional wells on these leases was correct as a matter of law. At the time the well, Treasure Well No. 8, was drilled, Section 1, Chapter 586 of the California Statutes of 1931, p. 1277, effectively prohibited the drilling of any additional well on the Fletcher lease, and the drilling of any well on the Burns No. 1 lease, after it had been combined with the Fletcher lease to constitute a drillsite for

the well which was then in process of being drilled upon the Fletcher lease. That statute reads in part as follows:

“Section 1. Any well hereafter drilled for petroleum . . . which is located within 100 feet of an outer boundary of the parcel of land upon which said well is situated . . . is hereby declared a public nuisance; . . .”

It will be noted that this statute required a surface area of 200 x 200 feet, or 40,000 square feet, for the drilling of one well. The testimony of Dr. Dodge above quoted shows that the two leases comprise an area of “47,000-some odd square feet.”

No other well was ever drilled, and at the time the property was condemned by the Government the same law was then in effect, it being found at that time in Section 3600 of the Public Resources Code. In view of the foregoing, Dr. Dodge very properly treated as academic the question of whether other wells could be drilled, and gave no consideration to that factor in arriving at his value for the working interest of Treasure Well No. 8.

Interesting questions might be raised as to what rights the holders of a royalty in one well have in the lease upon which the well is drilled, and it would be a still more interesting question as to whether they have any rights in an adjoining lease which was used only to make up a legal drillsite.

It is doubtless true that the royalty holders could prevent any fraudulent surrender of the Fletcher lease which would put it beyond the power of the lessee to continue to produce the well in which they had an interest, and which was located upon that lease. Cf. *La Laguna Ranch Co. v. Dodge*, 18 Cal. 2d 132, 114 P. 2d 351. *The Schiff-*

man case, *supra*, clearly establishes that any transferee of the leasehold, with knowledge of their rights, would take subject to them. As for the Burns No. 1 lease, it may well be that after having served its purpose of constituting a part of a designated parcel for the drilling of the well, the persons whose rights were confined to that well would have no further use for the adjoining lease, the Burns No. 1, although, of course, their obligation would continue to pay landowner's royalty to the lessor under that lease. He would be entitled to such royalty at the agreed rate out of the production from the well on the Fletcher lease, in consideration of his having permitted the joinder of the two leases, thus limiting the availability of the Burns No. 1 premises for drilling. Under the statute, the unavailability of the premises would continue. The same statute cited above prohibited the drilling of a well within 150 feet of any well theretofore drilled upon the designated parcel. Public Resources Code, Section 3600. Possibly the royalty holders in the one well on the Fletcher lease would have some rights to enforce this statute. Aside from that, they would certainly have no right to prevent the drilling of any number of additional wells upon either the Burns No. 1 lease or the Fletcher lease.

While they are interesting, these questions do not arise in the case at bar. We are concerned here with the distribution of a fund which was paid for an interest in certain property. The wording of the *Beaumont* judgment making the award for that property, and the testimony supporting the judgment, establish beyond doubt that the money was paid for the working interest in one well, and no one has questioned the fact that the royalty holders have their full percentage interests in

that one well. Certainly there can be no question about what the Bullens and Haywards have. Any argument based upon the *Vickers* judgment cannot apply to them, because they were not parties to it, and there can be no doubt that they have a full 2% interest in Treasure Well No. 8, together with all rights thereunto appertaining.

Conclusion.

It appears, therefore, that Judge Westover was correct in his ultimate conclusion that the royalty holders had the percentage interests called for by their respective assignments in the entire award made by the jury, and that the judgment in this regard should be affirmed.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY,
FULTON W. HOGE, and
EDWARD M. PATTERSON,

*Attorneys for Appellees Herschel Bullen, Mary H. Bullen,
J. C. Hayward and Mary S. Hayward.*

No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, etc., *et al.*,
Appellant and Respondent,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF LOS ANGELES,
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, *et al.*,
Defendants,

and

RECONSTRUCTION FINANCE CORPORATION, Assignee of TREAS-
URE COMPANY, THE ADAMANT COMPANY, WALTER B.
SCOVILLE, JOE SEEPL, HARRY WYNN, HERSCHEL BULLEN,
MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,
Respondents and Cross-Appellants.

Upon Appeal From the United States District Court,
Southern District of California, Central Division.

Brief for Reconstruction Finance Corporation,
Assignee of Treasure Company, Respondent.

FILED

JOHN H. RICE and
JULIUS A. LEETHAM,

DEC 20 1951

417 South Hill Street, **PAUL P. O'BRIEN**
Los Angeles 13, California, **CLERK**

Attorneys for Reconstruction Finance Corporation.

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SCOVILLE, JOE SEEPLER, HARRY WYNN, HERSCHEL BULLEN,
MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Respondents and Cross-Appellants.

**Brief for Reconstruction Finance Corporation,
Assignee of Treasure Company, Respondent.**

As pointed out in the statement of the case incorporated in the brief heretofore filed by Reconstruction Finance Corporation (hereinafter in this brief called "RFC"), as appellant, this is a case where all parties-distributee, including RFC, as assignee of Treasure Company, have taken an appeal from the judgment of distribution entered by the Honorable Harry C. Westover on October 30, 1950.

This brief which RFC files in its capacity as a respondent discusses the several contentions in the opening appellants' briefs filed by the appellants, The Adamant Company, Walter B. Scoville, Joe Seeples and Harry

Wynn, and by the appellants, Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward. The latter appellants, whose interests are identical, are hereinafter in this brief called the "Haywards." Insofar as possible, the arguments of the appellants have been treated seriatim.

There Is No Merit to the Contention That the "Haywards" Are Entitled to Distribution Under the "Two for One" Agreement Out of the Share of the Award Now Assigned to RFC.

The District Court held that Treasure Company did not execute the "two for one" agreement and is not bound thereby [Fdg. XXV, R. 146] and that the enforcement of this agreement is a personal matter between the "Haywards" and Scoville [Concl. VII, R. 152].

The "Haywards" allege error in the District Court's holding with respect to the "two for one" agreement and cite the case of *Recovery Oil Co. v. Van Acker*, which was before the District Court of Appeal on two occasions as reported in 79 Cal. App. 2d 639, 180 P. 2d 436 (1947), and in 96 Cal. App. 2d 909, 216 P. 2d 483 (1950). They assert that the *Van Acker* case is "on all fours" with the case at bar and that under its holding the "two for one" agreement is a royalty interest and therefore an interest in the land. On this premise the "Haywards" argue that they held a vested interest in the leasehold which was to have continued until they received payment in full, and that having received no payment their interest is transferred to the award which stands in place of the leasehold.

RFC concedes that if Treasure Company is bound by the "two for one" agreement, RFC's rights, as assignee of Treasure Company's interest in the award, are con-

trolled by the *Van Acker* case. However, the case is not "on all fours" with the case at bar even though the similarity of *some* of the facts presents one of those duplications of circumstance in which all lawyers delight.

In the *Van Acker* case the District Court of Appeal recognized the property interest of one Ada M. Crawford in an oil and gas leasehold estate because she was able to prove that a right to share the proceeds from a certain percentage of oil production up to a fixed dollar amount had vested in her through various assignments, as against an original obligor, the lessee, and against the successor to the lessee's interest who had taken with constructive notice of her chain of title. Thus, the case stands for the proposition that the agreement of the lessee of an oil and gas lease to share the proceeds of a percentage of his oil production creates a royalty interest which, under California law, is an interest in real property.

The clear cut distinction between the *Van Acker* case and the case at bar lies in the fact that the obligation to pay a percentage of the oil proceeds was, in the *Van Acker* case, the obligation of the original holder of a prospecting permit (whose property interest matured into a leasehold estate) whereas, in the case at bar the obligation to pay "two for one" was an obligation created not by the original lessee, Treasure Company, but by Scoville, to whom it had assigned a fractional interest in the oil production.

The assignee, Scoville, could reassign what he owned but could create no new royalty or vested interest in the leasehold of Treasure Company by agreement with third parties unless the lessee, Treasure Company, itself were bound by the agreement.

The question therefore is: Was Treasure Company, the original lessee, bound by the "two for one" agreement?

The "Haywards" in asserting that Treasure Company is bound by the "two for one" agreement urge the following points:

1. Treasure Company consented to an application filed with the Corporation Commissioner of California requesting the Commissioner's consent to the transfer in escrow to them of two 1% participating royalty interests from Scoville;

2. The application to the Corporation Commissioner recites the "two for one" agreement and Treasure Company therefore had knowledge of this agreement;

3. The funds advanced by the "Haywards" were transferred by bankers' cashier's checks which show in the respective chains of endorsement the following: "Treasure Company Trust Fund by G. de Bretteville, Trustee"; and

4. The funds so advanced were accepted by Treasure Company with knowledge of the terms upon which they were advanced and the money was used by Treasure Company for its own benefit so that Treasure Company is estopped to deny that it was a party to the agreement.

In support of the District Court's holding that Treasure Company is not bound by the "two for one" agreement, it is possible to make a lengthy argument to the effect that the consent of Treasure Company to the transfer in escrow with the Corporation Commissioner was merely an act of accommodation to facilitate the transfer and in no wise an agreement with the "Haywards"; that the knowledge of Treasure Company to the terms

upon which Scoville obtained funds from the "Haywards" creates no legal commitment on the part of Treasure Company; that the deposit of such funds into the "Treasure Company Trust Fund" was in accordance with the agreement between Treasure Company, The Adamant Company and Scoville [Adamant-Scoville-Wynn, Ex. "D," R. 202, 1272]; and that Treasure Company's use of such funds was predicated on its understanding that they were appropriated to the development of the leasehold by Scoville and/or by The Adamant Company, the stock of which was owned by Scoville's wife, Helen Scoville [R. 1242].

A lengthy argument is unnecessary because none of the testimony introduced by the "Haywards," which appears in the printed record [R. 1188-1244], supports the claim now asserted. On the contrary, such testimony supports the conclusion that whereas the president of Treasure Company refused to assume responsibility for the "two for one" agreement [R. 1208] the obligation was admitted by Scoville to be his responsibility [R. 1209].

The issue of Treasure Company's liability on the agreement is conclusively resolved by evidence which the "Haywards" themselves have introduced and in the light of this evidence it is difficult to understand the position which they have assumed in their opening brief.

A letter dated August 22, 1939, addressed to the president of Treasure Company by one of the "Haywards" (the appellant, J. C. Hayward) was introduced as "Petitioners Bullen and Haywards' Exhibit No. 5" [R. 1212].

This letter clearly admits that the "two for one" agreement was personal between them and Scoville. It states in part:

"I am enclosing herewith our instructions to Mr. Geo. Halverson agreed to by Walter B. Scovell and Walter B. Scovell Company, under date of September 27, 1938 in which *Mr. Scovell agrees to pay* to Herschel Bullen and the undersigned 15% of gross production from the well until the \$5,000.00 is paid back two for one. We regard this as your authority if you are still operating the well *to deduct from Mr. Scovell's account* each month the equivalent of 15% of gross production and divide it between Mr. Bullen and myself.

"This in no way makes you responsible to Mr. Scovell or the Scovell Company *as it was Mr. Scovell's suggestion and guarantee that we receive 15% of gross production from the well.*" (Emphasis added.)

The letter dated January 4, 1940, addressed to Charles S. Gass, Esq., who was then counsel for Treasure Company, by one of the "Haywards" (the appellant, J. C. Hayward) was introduced as "Petitioners Bullen and Haywards' Exhibit No. 6" [R. 1214]. This letter is even more pertinent and contains the following statements:

"It is our contention now and has been all the way through that if Mr. Scoville guaranteed all of the money necessary to complete the well, then Mr. Scoville's royalties should be diverted from him to pay the debts which were incurred and our small interest should come to us and not be used as they have been.

“Mr. Bullen and myself could both see this thing through to its present status and we have advised Mr. Scoville on many occasions to attempt a settlement out of court. He could not see his way clear to do this and as a consequence *it is going to be necessary for us to take any action necessary to recover our money from him. We have never looked to anyone else for our money though he has tried to put over the idea that it was the responsibility of the entire group. We have notified him in writing and in conference that we were looking to him and to no one else to fulfill the terms of our contracts.*” (Emphasis added.)

These admissions are such that all efforts to erect a legalistic scaffolding of estoppel on which liability of Treasure Company on the “two for one” agreement can be established must fail. Section 1589 of the California Civil Code, which the “Haywards” cite, is not material for such scaffolding. The Supreme Court of California has held that this section applies only when the person accepting the benefit of the transaction is himself a party to the transaction: *Canale et al. v. Copello*, 137 Cal. 22, 69 Pac. 698 (1902); 6 Cal. Jur. 60.

It follows that inasmuch as Treasure Company, the original lessee, is not liable on the “two for one” agreement between the “Haywards” and Scoville, the agreement creates no royalty interest which is an interest in the leasehold estate, and the “Haywards” must perforce now do what they have admitted they always did—look to their recovery on the “two for one” agreement from parties other than the lessee or its successor in interest.

There Is No Merit to the Contention That the Holders of Participating Royalty Interests in Treasure Well Have an Equitable Lien Upon the Lessee's Interest in the Condemnation Award to Secure Payment to Them of Their Share of the Net Proceeds From the Operation of the Treasure Well Prior to the Government's Seizure.

Paragraph IV of the District Court's judgment denied an equitable lien upon the jury award to all of the several claimants who had demanded such a lien [R. 156].

The appellants, The Adamant Company, Scoville, Seeples, and Wynn allege error in the denial to them of an equitable lien on the share of the award now assigned to RFC to secure payment to them of \$89,563.99 which they claim was owed to them by Treasure Company prior to the seizure date. They achieve this particular arithmetic by taking the sum of \$205,411.68, which was stipulated to have been substantially the sum of money handled by Treasure Company as the gross proceeds of Treasure Well's production from the date of its completion on December 8, 1938, to the date of its seizure on September 28, 1942 [R. 1236]; by computing 47% of this sum (the aggregate of The Adamant Company's 25% claim, Scoville's 16% remaining claim, and Wynn's 6% claim) to be the sum of \$96,543.49; by deducting therefrom \$6,979.50 as "a sufficient operating charge" and thus arriving at a net balance of \$89,563.99.

This ambitious computation deserves little consideration from this Court for the following reasons:

1. The stipulation on gross proceeds was "before the payment" of landlord's royalties [R. 1236], stipulated to have been 19.4% of the total production [R. 746].

2. No part of such gross proceeds handled by Treasure Company was owed to The Adamant Company, Scoville or Seeples for the period from December 8, 1938, to and including December 31, 1939 (for which there was an accounting) because of the express holding in paragraph II of the Vickers' Judgment [Adamant, Scoville, Wynn Ex. "E," R. 202, 1273].
3. Any portion of such gross proceeds handled by Treasure Company from January 1, 1940, to the date of seizure which may be owed to The Adamant Company, Scoville, and their assigns, is subject to a surcharge for their respective pro rata shares in the completion, operating and maintenance costs and charges of Treasure Well because of the express holding in paragraph III of the Vickers' Judgment, *supra*.
4. The completion, operating and maintenance costs and charges of Treasure Well to the date of its seizure are ascertainable and should not be arbitrarily estimated at \$6,979.50 on the basis of testimony of experts in the evaluation trial, which testimony was addressed solely to *prospective* operating expense such as would have been incurred during the future economic life of the well without reference to costs and charges *actually incurred* prior to the date of seizure.

5. A separate accounting action against Treasure Company of which the District Court took notice [Fdg. XXXVII (misprinted XXXVI), R. 150] has been brought by The Adamant Company and Scoville and is presently pending before the Honorable Pier-son M. Hall, Judge of the United States District Court for the Southern District of California. Whatever the issues of this suit, it may be assumed that there exists a dispute between the parties which has necessitated litigation. Accordingly, this Court should not be expected to decide the amount of the indebtedness, if any, owed by Treasure Company to The Adamant Company, Scoville, or their assigns, when the amount was not at issue between the parties in the distribution proceeding below *but is at issue between The Adamant Company, Scoville and Treasure Company in a collateral action not before this Court.*

The "Haywards" also allege error in the denial to them of an equitable lien on the share of the award now assigned to RFC to secure to them "specific payments which became due" from Treasure Company from its operation of Treasure Well prior to the date of seizure. The exact amount of the alleged "specific payments which became due" is not stated, but this Court is requested by them to remand the cause to the District Court with instructions to charge the share of the award now assigned to RFC for an amount which the District Court is to determine.

This request by the "Haywards" involves the consideration of several legal questions to which we respectfully direct the attention of this Court:

**Under What Circumstances Does the
Right to an Equitable Lien Arise?**

It is clear that the right to an equitable lien must arise in one of three ways: (a) where an express contract shows an intention to charge some particular property with a debt or obligation; (b) where the conduct of a party, in the absence of contractual intention, is such that a court of equity will impress a lien upon his property in favor of one whom he has wronged when the circumstances of their dealing prompts the court to order that done which should have been done; and (c) where, by express assignment or otherwise, a transaction resolves itself into a security arrangement so that, in the absence of an adequate remedy at law, assistance of a court of equity is required in the enforcement of the lien.

It is stated in 37 C. J. 315:

"An equitable lien either arises out of an antecedent and underlying contract, which deals with some specific property, or it arises by implication from the conduct and dealings of the parties, the right or charge being completed by equity, in pursuance of the maxim that equity looks upon things agreed to be done as actually performed. This doctrine, however, is not a limitless remedy to be applied according to the measure of the conscience of the particular chancellor; and where there is no contract out of which the lien could grow, nor any duty on one party to give to the other any charge or lien whatever, no basis for such a lien exists."

Similarly, it is stated in 33 Am. Jur. 427:

“An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. It is not an estate or property in the thing itself, nor is it a right to recover the thing, that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it. Such a lien may be created by an express contract which shows an intention to charge some particular property with a debt or obligation, or it may arise by implication from the relations and dealings of the parties whose interests are involved. Likewise, a lien may be created by an equitable assignment of a contract, debt, or fund. In fact, if a transaction resolves itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is in equity a lien.”

Is There an Express Contract Before This Court Which Reflects an Intention on the Part of Treasure Company to Have Created a Lien Upon Its Leasehold Estate in Favor of Parties to Whom It Assigned Participating Royalty Interests?

The “Haywards,” in their opening brief, cite two cases,¹ in each of which an equitable lien was recognized because of the existence of an agreement to pay a specific sum out of the income from certain property. The burden of their argument, however, is not based upon the precise holdings of these two cases. It rests instead upon the proposition that, in California, the holder of a royalty

¹*Legard v. Hodges*, 1 Ves. Jun. 477, 29 English Reports Chancery 684; and *Phillips Petroleum Co. v. Gable*, 128 F. 2d 943 (1942).

interest in an oil and gas lease which is created out of the lessee's estate has the same position as a beneficiary of a trust to whom the lessee, as trustee, owes a fiduciary duty. Under this reasoning it is to be supposed that the execution of an assignment of a royalty interest by the lessee constitutes a declaration of trust under the terms of which the lessee holds the leasehold estate for the use and benefit of the royalty holder.

There is no California holding for this proposition and the "Haywards" do not attempt to cite any. Nevertheless, they request this Court to give its approval to the proposition as an *extension* of the California law. Thus, they assert that *there would seem to be no reason why* the holding of the venerable English decision should not be applied to the case at bar, and they suggest that this Court should *not stop* at the point where the California courts have now stopped in defining the extent of their interests "*but should go further and give them complete relief.*" They do not argue that the lessee, Treasure Company, in executing assignments to the holders of the royalty interests *intended* to become a trustee for their benefit; they argue instead that "the lessee, *in effect*, agreed to hold the lease in trust for the assignees."

The argument of the "Haywards" is unconcerned with the distinctions between a legal interest and an equitable estate. On the one hand they admit that the interest which they own in the two 1% participating royalties is, under the California law, a legal interest. On the other hand, they argue that Treasure Company is their trustee which presupposes that Treasure Company holds the full legal title and that they hold an equitable estate. This apparent dilemma presents no road-block to their argu-

ment, however, because a single paragraph² in their brief suggests that the Federal Court in this proceeding should, as a court of equity, *go further* by impressing an equitable lien than the State courts have gone in holding that they have a legal interest but also suggests that the State Courts have already *gone further* than the equitable relief which they seek by giving them a legal interest.

A careful scrutiny of the California authorities will reveal at the outset that the *Schiffman* case³ which is cited by the "Haywards" as the leading case for the proposition that owners of participating royalties in an oil and gas lease have a property interest in the lease does not so hold.⁴

The leading California case which defines the rights of owners of participating royalties in oil and gas leases is *La Laguna Ranch Co. v. Dodge, et al.*, 18 Cal. 2d 107, 114 P. 2d 351 (1941), which the Supreme Court decided four years after the *Schiffman* case. Here the plaintiff as owner in fee, brought an action to quiet title against

²Haywards' opening appellants' brief at page 30.

³*Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937).

⁴The opinion in the *Schiffman* case states three separate times that the decision is not based upon the theory that the royalty holder owns an interest in real property. The opinion states, in part (64 P. 2d 1088): "We are of the view that whether or not the royalty assignments in this case transferred to the holders thereof an interest in the leasehold, *i. e.*, in the *profit a prendre* to produce oil, in any event they vested in the holders a right to share in the proceeds of oil produced during the continuance of the lease by an assignee of the lease with notice. We prefer to base our decision on this ground without determining the question of interest in the leasehold estate as such In the discussion which follows it may be assumed for purposes of this decision that plaintiff does not have an interest in the leasehold estate as such." (Emphasis added.)

the defendants who held fractional interests in the production of oil and gas under assignments from parties who had leased the property from the plaintiff. The question before the Court was "does the interest of the holder of a fractional share in the production of oil, which is created out of the estate of the operating lessee, survive after the lessee's voluntary surrender of the leasehold by a quit claim deed?" The trial court's decree quieting title in favor of the plaintiff was affirmed and the opinion of the Supreme Court holds as follows:

1. The defendants held an interest in real property but they did not hold as tenants in common with the lessee.
2. The defendants did not hold an "unlimited" interest but did hold a "determinable interest—a speculative interest in real property which they intended should be determinable by the lessees."
3. The defendants did not acquire from the lessee a portion of the *profit a prendre* or a portion of the leasehold.
4. The quitclaim deeds executed without fraud by the lessees in favor of the lessor operated to terminate the interest of the defendants.

Nowhere in the *La Laguna* opinion is there any suggestion that when the lessees assigned to the defendants fractional interests in the oil and gas production from the lease, the lessees agreed, in effect, to become trustees for the assignees. Certainly this holding, which remains the law of California, would not have been reached if the highest court of the state had construed the execution of the assignments by the lessees to have created a trust relationship because it is elementary that a trustee will

not be permitted to voluntarily convey away the corpus of the trust estate, even if he acts with an abundance of good faith. It is one thing to enjoy the rights of a *cestui que* trust, including the right to trace the assets of the trust, and quite another thing to own a “determinable” interest in real property which is subject to destruction upon the happening of a condition subsequent.

No attempt is made by RFC to define the rights of The Adamant Company and Scoville under their agreement with Treasure Company dated April 5, 1938 [Adamant, Scoville, Wynn, Ex. “D,” R. 202, 1272]. Apparently this agreement contemplated a joint ownership, *operation and control* of several leasehold estates by the parties and the sharing of profits and losses therefrom and it is possible that under its terms a “joint adventure” was established. Be that as it may, this agreement is not before this Court for the reason that it was terminated under the express provisions of paragraph III of the Vickers’ Judgment, *supra*, and the District Court so concluded [Concl. IV, R. 151-152]. Such rights as The Adamant Company and Scoville may have enjoyed in the joint operation and control of Treasure Well were lost to them as of January 31, 1939, under the express provisions of paragraphs I and IV of the Vickers’ Judgment, *supra*, and, accordingly, any reference in the Vickers’ Findings of Fact to a “joint adventure” was addressed to the relationship between the parties which existed prior to that date. At all times thereafter, the respective interests of The Adamant Company and Scoville were royalty inter-

ests which, under the law of California, are described as “over-riding royalties,” even though created out of the lessee’s estate.⁵

It is submitted, therefore, that the facts of this case present no express contract showing the *intention* of Treasure Company to charge its property with any debt or obligation either as trustee or otherwise.

Is There, in This Case, a Showing of Such Improper or Fraudulent Conduct on the Part of Treasure Company Towards the Holders of the Royalty Interests as to Induce a Court of Equity to Impress an Equitable Lien on Treasure Company’s Share of the Award Now Assigned to RFC?

It is conceded that if Treasure Company has acted so unconscionably as to appropriate the property of the royalty holders, such property, or its proceeds, in the hands of Treasure Company, or in the hands of its successor in interest, should be impressed with an equitable lien, not on the grounds of a resulting trust but on the grounds of a constructive trust.

The record in this case however, discloses no evidence of any sort on which this Court can base a judgment that Treasure Company should be charged with the duties of a constructive trustee. There are self-serving statements in the briefs filed by the royalty holders that Treasure

⁵In the *La Laguna* case, *supra*, the Court states: “The term ‘over-riding royalty’ is applied generally in the industry to such fractional interests in the production of oil and gas as are created from the lessee’s estate. This is true whether the over-riding royalty is created by reservation when the original lessee transfers his interest by a sub-lease or whether it is created by grant when the original lessee conveys a fractional share to a third person, as in the instant case.”

Company has refused to pay its debts to them but there is not before this Court any proof that Treasure Company does, in effect, owe any debt to them at all.

The alleged debts arose prior to the condemnation seizure and the only evidence which is before this Court as to the conduct of Treasure Company towards the royalty holders prior to the Government's seizure consists of the Findings of Fact and Conclusions of Law of the Los Angeles County Superior Court which support the Vickers' Judgment, *supra*. Among other things, Judge Vickers there found that the defendant, Treasure Company, did not, as alleged in the complaint, convert all or any part of the leasehold property to its own use to the exclusion of any of the plaintiff royalty holders [Vickers' Finding VI, R. 202, 1273]; that when the defendant, Treasure Company, took over the management of Treasure Well, it was operated on its behalf in a good and workmanlike manner and in accordance with good oil field practice, and that none of the plaintiff royalty holders suffered any loss, damage or injury because of said management [Vickers' Finding XVII, R. 202, 1273]; and that as of December 31, 1939, nothing was due or owing by the defendant Treasure Company to any of the plaintiff royalty holders [Vickers' Concl. VIII, R. 202, 1273].

It should be emphasized that the appellants who herein seek an equitable lien do not contend that the particular fund on which they seek the lien was appropriated by Treasure Company from their property. They seek equitable relief merely as alleged unpaid creditors and there-

fore bring to this Court a dispute which is entirely extraneous to the condemnation proceeding. In other words, they would have this Court instruct the District Court in the distribution proceeding to review their course of dealing with Treasure Company prior to the Government's seizure to determine whether any indebtedness is in fact owing to them by Treasure Company, and if so, to grant equitable relief on the theory that Treasure Company is a constructive trustee of its own property for their use and benefit as its creditors.

As above pointed out, The Adamant Company and Scoville have already commenced an accounting action against Treasure Company, which is now at issue in another court, but even if this action were not pending we submit that this Court should question the propriety of a District Court adjudicating in its order of distribution disputes between the claimants to a condemnation award where the disputes are extraneous to the issue of determining those whose property interests have been seized and for which compensation is payable. In *Florida Beaches, et al. v. Niagara Investment Co., et al.*, 148 F. 2d 963 (1945), the Court of Appeals for the Fifth Circuit even adopted this view where the facts indicated that equitable relief was justified and where the collateral dispute was not altogether extraneous to the condemnation proceedings. A foreclosure sale for unpaid taxes had been confirmed to the grantor of Niagara Investment Co. and the prior legal mortgage of Florida Beaches, a corporation, was thereby extinguished. The mortgagee had a right of redemption which was allowed to expire because of an asserted con-

tract between it and the purchaser at the tax sale under the terms of which Florida Beaches purported to enjoy the right to buy the condemned land, designated as Tract 15B, together with other lands which had not been condemned. Niagara Investment Co. claimed the condemnation award but the fund was also claimed by Florida Beaches by reason of its alleged contractual rights which were in default. The Court of Appeals affirmed the District Court's order distributing the fund to Niagara Investment Co., which held the legal title at the time of condemnation, without prejudice to the assertion by Florida Beaches of its rights in a pending equitable proceeding between the parties in the state courts. The Circuit Court of Appeals said at page 964 of 148 F. 2d:

"If Florida Beaches, or those who represent it, had a valid contract to acquire title, or under the circumstances had an equity to redeem from the sale, it involves the other tracts along with this one, for a lump sum, and needs the aid of a court of equity for its establishment and enforcement. The relief would relate not simply to Tract 15B, but to the entire contract. We do not doubt that in distributing the funds in a condemnation proceeding the District Court can recognize not only the legal title, but also plain equities in the property condemned, but we think it is going too far for it to undertake specific performance of a contract and an adjustment of equities about other lands also, between corporations of the same state over whose controversy it did not have original jurisdiction. The most it ought to do would be to keep the fund safe, if that is shown to

be necessary, until the parties can protect their rights in it elsewhere. It appears in this record that there are already pending in a state court equitable proceedings between these parties where this can be done.”

Do the Circumstances in This Case Resolve Themselves Into a Security Transaction Between Treasure Company and the Royalty Holders Giving Rise to a Lien in Favor of the Royalty Holders Which a Court of Equity Will Recognize and Enforce?

This question must be answered in the negative. None of the appellants who seek an equitable lien on the portion of the award now assigned to RFC have contended that Treasure Company has created an equitable mortgage in their favor on its leasehold estate, and it is obvious that the assignments by Treasure Company of fractional shares in the production from Treasure Well was, in no sense of the word, a security transaction. In this connection it should be noted, in passing, that the “Haywards” have admitted that their funds were advanced by them as “investors” for the repayment of which there was “no personal obligation whatever of anyone.”⁶

On the basis of the foregoing analysis, we respectfully request this Court to affirm the District Court’s holding that no equitable lien should be impressed upon that portion of the condemnation award which is now assigned to RFC.

⁶Page 32 of opening appellants’ brief of “Haywards.”

There Is No Merit to the Contention That the Jury Award Was Based Upon Eighty and Six Tenths 1% Working Interest in the Leasehold Upon Which Treasure Well Was Drilled Entitling the Royalty Holders to Have the Award so Distributed That for Each 1% Participating Interest They

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Will Respectively Receive 80.6 of \$194,500.00.

The District Court in its order of distribution awarded to the holders of each 1% participating interest an amount

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equal to $\frac{1}{100}$ of the net balance of the award [Paragraph II of Judgment, R. 155]. Whereas, RFC has alleged error in the District Court's holding that the total award stands for the lessee's interest in the Fletcher Lease alone,⁷ the District Court, in our opinion, was correct in

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construing each 1% participating royalty interest to be $\frac{1}{100}$ of the total sum in which the participating royalty holders were entitled to share.

The Adamant Company, Scoville, Seepie and Wynn, as well as the "Haywards," allege error in the refusal of the Court to divide the award into 80.6 parts.

The basic fallacy in their contention is evidenced both in the statement of The Adamant Company, Scoville, Seepie and Wynn that "The jury award covered only 80.6% of the leasehold"⁸ and in the "Haywards'" reference to

⁷Pages 24-29 of the opening appellant's brief of RFC.

⁸Page 21 of the opening appellants' brief of The Adamant Company, Scoville, Seepie and Wynn.

“the money which was awarded for the 80.6% working interest.”⁹

As we have previously emphasized,¹⁰ the term “total working interest” in Treasure Well was defined with particularity by witnesses in the valuation trial as the *anticipated net profit* to the lessee which would have been derived (in the absence of condemnation) in working Treasure Well during its life expectancy, taking into consideration the potential production, the estimated operating expenses, and the burden of the landowners’ royalties [R. 307-310, 332-333, 343]. Whatever the meaning of this term in the oil industry generally, the jury in the valuation trial understood the term to mean a valuation in dollars by which they were to measure the fair market value of the entire leasehold estate.

We repeat that the Government did not seize in condemnation the lessee’s anticipatory profits as such. The Government condemned land, including a leasehold interest in the land, and although the concept of “total working interest” was used as a yardstick to determine the value of the leasehold estate, certainly it does not follow that the yardstick was itself condemned.

The jury’s verdict places a valuation of \$194,500.00 upon the “total working interest in Treasure Company Well No. 8” by which the jury intended to assess the fair market value of the entire leasehold estate. If the word “total” means anything when expressed in terms of arithmetic percentages, it means 100%. The figure 80.6% is

⁹Page 39 of the opening appellants’ brief of “Haywards.”

¹⁰Page 29 of opening appellant’s brief of RFC.

by its very nature part of the total 100% and it is quite meaningless to argue, as do some of the royalty holders,¹¹ that the jury award should be divided “among the total working interests of eighty working interests and six tenths and not among ‘100 working interests’—which *latter never existed.*”

Assuming, for purposes of the argument, however, that no more than 80.6% of the “working interest” of Treasure Well was owned in the aggregate by all of the appellants before this Court, the remaining 19.4% of the “working interest” must, of necessity, have been owned by someone. Who else could have owned the remaining 19.4%? There are no other parties to be considered except the landlords. Can it be argued that the landlords owned the remaining 19.4%? This conclusion is not tenable because the landlords, although entitled to a 19.4% royalty on the gross production of the well, did not share in any way in the *net* profits of the leasehold.

Fortunately, the record discloses that the jury fully understood that a landlord’s right to oil royalties was a matter separate and distinct from what the witnesses called a “working interest.” After the jury had commenced its deliberations, it requested further instructions from the Court on this very point and reappeared before Judge Beaumont. The foreman of the jury requested the assistance of the Court in reviewing the evidence which

¹¹Page 27 of opening appellants’ brief of Adamant Company Scoville, Seepie and Wynn.

had been presented with respect to the valuation of the “working interest” in Burns’ subleases 2 and 3 to Treasure Company,¹² designated in the form of verdict as “Parcel S” [R. 1169].

Judge Beaumont thereupon read to the jury from the transcript of the valuation trial the testimony of the witness, Dodge, who had expressed an opinion that whereas the landowners’ royalties under the Burns’ subleases 2 and 3 were valuable, there was, in his opinion, no value to the “working interest” in the two leases [R. 1180-1181]. In particular, Judge Beaumont read to the jury the explanation which the witness, Dodge, gave:

“Assuming a well like Vidor 18 was drilled, the Union Oil Company drilled that well, put up the money and they lost money, but they had to pay their royalty to the owner of the Vidor lease, without regard to whether the well was economical or not, *so it might be an instance where a landowner’s royalty might possibly have value where a working interest would have no value.*” (Emphasis added.)

If the concept of “working interest,” as thus explained, precludes by definition the interest of the landlords and if there are no other parties in interest except the operating lessee and its assignees, it necessarily follows that the “total working interest” was intended by the jury to represent the full 100% interest in the leasehold estate.

It should not be overlooked that the valuation trial was an *in rem* proceeding. It was concerned solely with the

¹²It was necessary to establish the market value of these leaseholds because the appellant, Wynn, claimed an interest in them under assignments from Treasure Company. No other interest in the leaseholds existed except that of Treasure Company and its claim was relinquished in a settlement made out of court.

valuation of various parcels of property and the rights of the respective claimants to such property were not considered by the jury. Not until the valuation judgment had been entered and the award deposited in the registry of the Court did the issue arise as to whom the party claimants are and the amount of their distributive shares.

In legal contemplation, there is no basis for the assumption that a 1% participating royalty interest in the leasehold, which the Court was called upon to evaluate in the distribution proceeding, is equivalent to any particular percentage of the "total working interest" as understood in the valuation trial. Any connection between a participating royalty interest and a percentage of the "total working interest" is without legal foundation and is fictitious. The one is a property right entitling the holder to share in the net *actual* production of a leasehold. The other, at least for purposes of this case, is a pure abstraction, involving a *conjectural* production for a probable period based upon nothing more than informed guesses of experts.

Suppose, for example, there had been no valuation trial. Suppose the Government had not only settled with the landlords out of court but had also reached an amicable lump sum joint settlement with the lessee and its royalty holders and, with their consent, had deposited the sum with a stake-holder until its distribution could be agreed upon. If a dispute then arose among the claimants as to how the fund should be divided and the matter were litigated—the court would not be concerned with the value of the oil which would have been produced or with the amount of operating expenses which would have been incurred. Even if the lease, in the opinion of experts,

were capable of no further production, the parties litigant could be expected to assert their rights to the fund on the basis of their percentage ownership in the leasehold and not in the unproduced oil.

This supposititious case is analogous to the case at bar. There was no amicable settlement but there was a lump sum settlement by operation of law in a proceeding which took no cognizance of individual claims to the property. How the award was computed is irrelevant to the present dispute so long as the fund stands, as it does, for the aggregate of all of the rights of the claimants.

We, accordingly, request this court to settle the dispute which has arisen on the sound legal basis that a leasehold estate has been destroyed, that its fair market value on the date of seizure is now represented by a fund, and that the fund must be divided as though there were a verdict reading "For the entire leasehold estate of the Fletcher Lease and the Burns No. 1 Lease—\$194,500.00."

There Is Merit to the Contention of the "Haywards" That Their Share of the Award Should Not Be Measured by the Net Balance of \$191,700.00 but Should Be Measured by the Total Award of \$194,500.00.

RFC concedes that inasmuch as the "Haywards" did not join in the stipulation upon which the District Judge awarded the sum of \$2,800.00 as an expense of Master-ship in a collateral accounting case brought by The Adamant Company and Walter B. Scoville against Treasure Company, no part of such expense should be borne by the "Haywards."

Conclusion.

For the reasons set forth above, this Honorable Court should deny the specifications of error asserted by the appellants, The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, and the specifications of error asserted by the appellants "Haywards," except with respect to their contention concerning their liability for a portion of the Mastership fees, and should reverse the judgment of distribution of the Honorable Harry C. Westover entered on October 30, 1950, with instructions to make appropriate findings and to enter judgment in accordance with the prayer of the Reconstruction Finance Corporation, assignee of Treasure Company, as appellant.

Respectfully submitted,

JOHN H. RICE and
JULIUS A. LEETHAM,

Attorneys for Reconstruction Finance Corporation.

No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD
and MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; UNITED STATES OF AMERICA and
RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Reply Brief of Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward to
Appellees' Brief of the Adamant Company, Walter
B. Scoville, Joe Seeples and Harry Wynn.

WILLIAMSON, HOGE & CURRY,
FULTON W. HOGE, and
EDWARD M. PATTERSON,

417 South Hill Street,
Los Angeles 13, California,

*Attorneys for Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward*

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No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD
and MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; UNITED STATES OF AMERICA and
RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Reply Brief of Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward to
Appellees' Brief of the Adamant Company, Walter
B. Scoville, Joe Seeples and Harry Wynn.

Herschel Bullen, Mary H. Bullen, J. C. Hayward and
Mary S. Hayward, as appellants in this case, submit here-
with their closing brief replying to the "reply brief" of
Adamant Company, Walter B. Scoville, Joe Seeples and
Harry Wynn, appellees.

The appellees begin their argument by asserting, page
4 of their brief, that the two for one agreement is not a
royalty. The question of whether the document creates
a royalty is just a matter of language, and does not af-
fect the substance of the problem. We called the two
for one agreement a royalty because, under the law of
California, it is a property interest in oil or the proceeds

thereof, and also because it is an interest in real property. If, as the appellees appear to assume, a royalty is limited to something that represents a continuing ownership, then they are right that the two for one agreement is not a royalty. While the Bullens and Haywards did not make a loan, a part of what they got for their investment, the two for one agreement, is in the nature of a security interest, and terminates when the holders have received \$10,000.00 from the gross proceeds of production. It is, however, definitely more than a lien. As stated by the court construing a similar document in *Recovery Oil Co. v. Van Acker*, 96 Cal. App. 2d 909 at 912, 216 P. 2d 483 at 485:

“Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed.”

In the *Van Acker* case, as in our case, when the \$10,000.00 was paid the estate would cease, just as the estate created by an ordinary trust deed ceases when the note or other obligation which it is given to secure has been paid.

The statement on page 5 of the reply brief of The Adamant Company, Walter B. Scoville, *et al.*, as follows:

“In the *Van Acker* case, *supra*, the interest created by the assignments constituted a direct proportion of the oil, gas and other hydrocarbon substances.”

is in error, if by that statement it is intended to convey the thought that the holder of the assignment in the *Van Acker* case had a continuing interest after the \$10,-

000.00 had been paid. As said by the court in 96 Cal. App. 2d at page 912, 216 P. 2d at page 485:

“The assignments by which the respondent acquired her interest assigned to her a certain share in the production from the land *until such time as she received \$10,000.00. Her interest was to terminate when she received this amount*, otherwise it would run for the full term of the lease.” (Italics ours.)

The document, which has been called for convenience “the two for one agreement,” is referred to several times by the appellees as “a bonus contract.” We see no legal significance in either designation. The appellants invested \$5,000.00 in a wildcat oil well, and it was agreed that they would receive \$10,000.00 out of the first 15% of gross production. This is precisely what the document involved in the *Van Acker* case entitled the holder to receive. The facts that in our case it represents a two for one return on the investment, and that the appellants were also to receive a 2% participating royalty which was a continuing interest in the well, are, we submit, immaterial.

We repeat that the *Van Acker* case is absolutely on all fours with the case at bar in so far as the two for one agreement is concerned. The only distinction between that case and ours has been pointed out on pages 17 and 18 of our opening brief, and that is a distinction without a difference.

At page 8 of their brief, the appellees discuss *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, 134 P. 2d 777. We cited this case, at page 18 of our brief, merely for the

proposition that no particular form is required to transfer an interest in an oil lease. That should apply to a security interest, a limited royalty, or whatever the two for one agreement is properly called, as well as one of continuing ownership, the latter being involved in the *Hallmark* case.

The case of *Helvering v. O'Donnell*, 303 U. S. 370, 82 L. Ed. 903, was a tax case involving the question of whether the holder of an agreement entitling him to one-third of the net profits from the operation of certain oil properties, was entitled to a depletion allowance. The Supreme Court held that he was not, reversing a decision by this Court. The Supreme Court said, at 82 L. Ed. 904:

"The agreement to pay respondent one-third of the net profits derived from the development and operation of the properties was a personal covenant and did not purport to grant respondent an interest in the properties themselves."

This statement is simply wrong. The California law, though in a state of flux at the time, was and is otherwise. (*Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081.) If the quoted statement were good law, nothing would be payable out of the award in this case to the holders of the participating royalties, most of which are held by The Adamant Company, Scoville, *et al.*, and they should be the last to cite the case. In any event, it does not apply to the two for one agreement held by the Bullens and Haywards, which, as the appellees point

out, is not a participating royalty. It is not participating in the technical sense, because the interest is in *gross* production. It is not participating in a general sense, because it does not continue indefinitely, but ceases when a certain sum has been paid.

The case of *Morrison v. Havens*, 24 Cal. App. 2d 504, 75 P. 2d 515, cited on page 11 of appellees' brief, involved the interpretation of a document which the court characterized as an "informal memorandum." We have, in our case, a very definite and specific agreement, even though it is contained in a letter [Petitioners Bullen and Haywards' Exhibit 1]. In view of the very recent *Van Acker* case, dealing with our precise facts, it is submitted that we need not be concerned with older cases or general authorities.

At page 12 of the appellees' brief, they make the point that Treasure Company handled the proceeds of the well prior to its condemnation, which is, of course, true, and they argue from this that Treasure Company should be the only one liable for payment of the \$10,000.00 out of 15% of gross production to which the Bullens and Haywards are entitled under the so-called two for one agreement. This misses the point as to the nature of the interest created by the two for one agreement. It is a specific agreement that a certain sum of money will be paid out of the production of the well, and it creates a charge in the nature of a trust deed upon all interests in the well owned by the people who were parties to it, or who were bound by it.

The two for one agreement does not depend upon the misapplication of trust funds, as does the lien held by the participating royalty holders, which arises from the failure to pay to them the net proceeds of production to which they were entitled. That lien, it is true, runs only against the interest of Treasure Company, which was the operator of the well, and which violated its fiduciary obligations to the other co-owners of the working interest, the participating royalty holders. The *Van Acker* case clearly establishes that the property interest created by the agreement to pay a specific sum of money out of the proceeds of production of an oil well does not depend upon the failure of the operator to pay over the money.

The statement of the appellees on page 13 that they fail to find any pledge of the interest of Walter B. Scoville as guaranteeing fulfillment of the two for one agreement ignores the fact that Scoville is the one who made the agreement. Whatever may be the situation as to The Adamant Company, Scoville's name was signed [R. 1196] to the letter agreement of September 27, 1938 [Petitioners Bullen and Haywards' Exhibit 1], which specifically provided:

“ . . . these funds, \$5,000.00, to be included in the said necessary funds to be repaid two for one out of production . . . , it being understood and agreed to that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well.”

The appellees miss the point for which *Gates v. Salmon*, 35 Cal. 576, was cited. (This case is cited at page 28 of our brief, through a printer's error, as *Gapes v. Salmon*.) At page 13 of the appellees' brief, they quote the statement of the court, from page 587 of the opinion:

"The rule upon this point is, that one tenant in common cannot convey any specific part of the land so as to prejudice his co-tenant."

This quotation might have been completed by language from page 588 of the opinion, as follows:

"He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if on the partition of the general tract, they should not be allotted to the grantor. Subject to this contingency the conveyance is valid *and passes the interest of the grantor.*" (Italics ours.)

When Scoville made the agreement with the appellants that their investment would be repaid two for one out of 15% of the gross production of the well, he made what amounted, in equity, to a conveyance of whatever interest in the well he possessed, such conveyance creating a burden in the nature of a trust deed upon his interest to secure the payment of the money. The fact that he did not own the full interest in the well, and that thus, in the absence of an express or implied agreement by the other co-owners, the conveyance would not bind their interests, does not prevent it from binding the interest of Scoville, and *Gates v. Salmon* so holds.

Conclusion.

As decided by the California District Court of Appeal in a case in which a hearing was denied by the Supreme Court of California, and which involved precisely the same facts as the case at bar, *Recovery Oil Co. v. Van Acker*, 79 Cal. App. 2d 639, 180 P. 2d 436, 96 Cal. App. 2d 909, 216 P. 2d 483, the Bullens and Haywards have what we think may be properly termed a limited royalty, constituting an estate in the working interest of Treasure Well No. 8, in the nature of a trust deed, which secures the payment to them of the sum of \$10,000.00, with interest from the date or dates when payments should have been made thereon; this estate covers those parts of the working interest owned by everyone who was a party to or is bound by the so-called two for one agreement; and without any peradventure of a doubt, it covers that part of the working interest, to-wit, 19% of the total net production from the well, owned by the appellee Walter B. Scoville, who negotiated and signed the agreement.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY,
FULTON W. HOGE, and
EDWARD M. PATTERSON,

*Attorneys for Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward.*

No. 12961.

IN THE
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HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD
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Appellants,

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ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; UNITED STATES OF AMERICA and
RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Upon Appeal From the United States District Court,
Southern District of California, Central Division.

Reply Brief of Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward,
Replying to Brief of Reconstruction Finance Cor-
poration, as Respondent or Appellee.

WILLIAMSON, HOGE & CURRY, and
FULTON W. HOGE,

417 South Hill Street,
Los Angeles 13, California,

*Attorneys for Appellants Herschel Bullen, Mary
H. Bullen, J. C. Hayward and Mary S.
Hayward.*

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Reply Brief of Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Mary S. Hayward,
Replying to Brief of Reconstruction Finance Cor-
poration, as Respondent or Appellee.

Summary of Argument.

The brief of Reconstruction Finance Corporation, filed in its capacity as respondent, or appellee, in answer to the opening brief of the appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward, raises three main points and we will reply to them in the same order, as follows:

(1) There *is* merit to the contention that the two for one agreement is binding upon the R. F. C., as the assignee of Treasure Company, and this is a controversy which should be determined by the District Court;

(2) The holders of participating royalty interests *do* have an equitable lien upon the lessee's interest to secure payment to them of their share of the net proceeds from the operation of the well prior to the seizure thereof by the Government; and

(3) These appellants *are* entitled to $\frac{1}{80.6\text{th}}$ of \$194,500.00 for each 1% participating royalty held by them.

I.

There Is Merit to the Contention That the Two for One Agreement Is Binding Upon the R. F. C., as the Assignee of Treasure Company, and This Is a Controversy Which Should Be Determined by the District Court.

On pages 6 and 7 of the R. F. C.'s brief certain letters written by Dr. Hayward are discussed. The contention is made that these letters establish that the Bullens and Haywards, whom the R. F. C. refers to as "the Haywards," have no rights to enforce the two for one agreement against Treasure Company. Before writing the letters, in which he made the statement that he and Mr. Bullen had always looked to Scoville for the payment of their money, Dr. Hayward had a conversation in the summer of 1939, with Mr. de Bretteville. de Bretteville claimed that he didn't know anything about the two for one agreement, as shown by the following testimony of Dr. Hayward [R. 1207-1208]:

"A. We hadn't received any royalties or any two-for-one payment on the money we had sent down. We came down to see what was going on.

Q. Did you make any inquiry of Mr. de Bretteville at that conference as to why you hadn't received any money? A. Yes, we asked him why we hadn't

been receiving our share of the 15 per cent money that was coming to us, why we hadn't received some royalties inasmuch as we were the small shareholders.

Q. What did he say? A. He said that he didn't know anything about the 15 per cent, and that he had been so involved in well expense that there wasn't any money for anybody because all the money that had been taken in had been used to pay off obligations and keep the well in operation.

Q. Was there any further discussion at that time, as you recall, of the 15 per cent or two-for-one deal, as it is sometimes referred to? A. Mr. de Bretteville said he knew nothing about it, and consequently it was not his responsibility; that he had never authorized it, and it was up to us to look for our money from Mr. Scoville if and when it came to him."

A fair analysis of the letters in question, which followed this conversation, is that they simply affirmed the self-evident proposition that if de Bretteville, or rather his company, Treasure Company, which was then in possession of the well, was not going to recognize the agreement, Dr. Hayward nevertheless expected Scoville to perform it, Scoville being the one who had dealt with the Bullens and Haywards in the first place, and therefore being the person to whom they looked to carry out the agreement.

Furthermore, Dr. Hayward was at that time seeking to have any money that was owing to Scoville on his participating royalties applied by de Bretteville on the two for one agreement. It must be borne in mind that Dr. Hayward is not a lawyer, and that as a practical layman,

he was trying to get his money in the easiest way possible. He testified on this point as follows [R. 1210-1211]:

“Q. After that, did you make any attempt to get Mr. de Bretteville to pay you your two-for-one and charge it to Mr. Scoville’s interest? A. Yes, I asked him on one occasion—I gave him a letter on one occasion stating what had happened and asked him to charge it up to Mr. Scoville and send it on down because I knew it would be all right with Mr. Scoville inasmuch as he had told us that it would be all right.”

There is no waiver in the letters of any rights against Treasure Company, and if there were, no consideration for it is shown, nor any reliance upon it by Treasure Company. These conversations and the letters were long after the two for one agreement had been made, and the money of the Bullens and Haywards had been accepted by de Bretteville, as trustee and used to complete the well.

The R. F. C. fails in its attempt to dispose of our point that even though Scoville may not have been authorized to commit Treasure Company to the obligation of the two for one agreement in the first instance, Treasure Company cannot show such lack of authority, because it accepted the benefits of the transaction with knowledge of it. The case of *Canale, et al. v. Copello*, 137 Cal. 22, 69 Pac. 698 (1902), cited on page 7 of the R. F. C. brief, involved the question of whether a person who went into possession of leased premises and paid rent thereon for a while, and then moved out, became bound by the terms of the lease, and was therefore obligated to pay all rent accruing thereafter. The person who took such temporary possession was the wife of the deceased lessee. He had

made an assignment to her of the lease, which the court found had never been delivered and never took effect. It was contended that the wife, as assignee of the lessee, became bound under Section 1589 of the California Civil Code, because she accepted the benefits of the lease. In addition to holding that an assignment had not been completed, the court said that Section 1589 applies only when the person accepting the benefit of the transaction is a party to it. This language, however, should be read in the light of the facts of the case which the court was deciding. The rationale of the decision, or rather one ground of it, is simply that the section does not apply to the *assignee* of one of the original parties to the contract.

Acceptance of benefits is a substitute for authorization where a person purporting to act as the agent of another has attempted to bind him. An accurate statement of the rule is to be found in 6 Cal. Jur. 60, also cited by the R. F. C., where the following statement is made, in speaking of Section 1589:

“But this doctrine applies only to a transaction to which the person accepting the benefit is, *or purports to be, or is claimed to be*, a party, but who would not have been bound by the transaction if he had not accepted the benefit thereof.” (Italics ours.)

In making the two for one agreement, Scoville did purport to act for Treasure Company. Dr. Hayward testified as follows [R. 1191]:

“A. Yes. Well, he said that he had invested money in an oil well here in California near the Venice Field that had the prospect of being a commercial producer, and that he was authorized and instructed by a committee which was responsible for drilling the well to go out and raise funds to complete

the well which had been drilled to what he called the basement, a distance of something over 6,000 feet.”

It will be recalled that the agreement of April 5, 1938 [Treasure Company's Exhibit QQ] and the addendum thereto [Treasure Company's Exhibit RR] between Treasure Company, Scoville, *et al.*, appointed a committee which at the time of the investment by the Bullens and Haywards had possession of the well, and the responsibility of completing it. That committee was acting for Treasure Company, as well as for the other parties to the agreement. In his negotiations with the Bullens and Haywards, Scoville was therefore purporting to represent Treasure Company, whether he had any authority to do so or not.

Judge Westover paid little attention to any evidence along this line, and rejected some offers of proof, doubtless because he had reached the conclusion that the two for one agreement was merely a personal matter, and not enforceable in this proceeding in any event. [Conclusion of Law VII, R. 152.] While we are confident that our rights under the two for one agreement at least bind the interest of Scoville, and that the judgment must be reversed on that ground alone, we believe that in any new trial which may be ordered the District Court, under applicable provisions of law to be laid down by this court, should go into the question of whose interests, in addition to Scoville's, are affected by the two for one agreement. It would be strange if all the other interested persons did not know of this agreement, and if they did, it is only just that all should contribute to the payment of the obligation it creates. The money put up by the Bullens and Haywards completed the well, without which there would have been no values for any one.

II.

The Holders of Participating Royalty Interests Do Have an Equitable Lien Upon the Lessee's Interest to Secure Payment to Them of Their Share of the Net Proceeds From the Operation of the Well Prior to the Seizure Thereof by the Government.

An equitable lien should be imposed in this case because there was a fiduciary relationship between Treasure Company, as operator of the well, and the holders of the participating royalty interests, and the fiduciary, which also had a beneficial interest, should not be permitted to stand on an equal footing with the other beneficiaries which it has wronged. Its beneficial interest, under the authorities cited on pages 34 and 35 of our opening brief should be charged with a lien to secure the payment to the other beneficiaries of the money which was wrongfully diverted from them.

The R. F. C. does not question these authorities, and presumably agrees to the general rule. It apparently questions the existence of the fiduciary relationship, and also raises the question as to whether any money was actually owed. At page 15 of the R. F. C. brief it is said:

“Nowhere in the *La Laguna* opinion is there any suggestion that when the lessees assigned to the defendants' fractional interests in the oil and gas production from the lease, the lessees agreed, in effect, to become trustees for the assignees.”,

and they rely on this case as holding that no such trust relationship exists. That case, *La Laguna Ranch Co. v. Dodge, et al.*, 18 Cal. 2d 132, 114 P. 2d 351, simply holds that a lessee who has made assignments of royalty in-

terests out of the share to which he is entitled as lessee may thereafter *in good faith* surrender the lease to his lessor. So far as appears from the facts of the case, it may simply have been one where, as frequently happens, the lessee fails to discover oil, and quitclaims the premises to the lessor. Indeed, he might have been obligated to do so under the terms of the lease. At any rate, the usual oil lease, as is well known, gives the lessee the right to surrender the lease, or any part of the premises covered thereby, thus giving him a means of avoiding the continuing obligation to conduct exploration or pay rent in lieu thereof. The rule of *La Laguna* is simply that holders of royalties assigned out of the lessee's interest take subject to the lessee's right of surrender. The question of any fraudulent exercise of the right is expressly reserved by the opinion, and the existence or non-existence of a fiduciary relationship between the operating lessee and the royalty holders was not involved.

The California court has expressly held, however, that such a relationship exists. (*Differding v. Ballagh*, 121 Cal. App. 1, 8 P. 2d 201.) In this case three individuals who held an oil lease made assignments of royalty interests to finance the drilling of a well. The royalties so sold were not subject to expenses of operation. Thereafter two of the lessees entered into a transaction with the third one whereby, for a valuable consideration, they assigned to him a similar royalty, entitling the holder to 5% of the gross proceeds of oil produced and saved. In this action that lessee sought to assert his ownership

of this 5% overriding royalty. The court below held against him. The District Court of Appeal affirmed the judgment, and a petition for hearing by the Supreme Court was denied. The case involved the precise question of whether a fiduciary relationship exists between an operating lessee and persons to whom the lessee has assigned royalty interests. In speaking of the contentions made by the lessee holding the 5% overriding royalty assigned to him by the other two lessees, the court said, at 121 Cal. App. page 6:

“Their soundness all depends on whether or not there was a relation of trust and confidence existing between the production owners and Differding and his two cotrustees. The question follows of whether or not the assignment of the overriding royalty to Differding resulted in detriment to the production owners. We will confine our discussion to these two questions.”

On the first question, that is to say, the existence of the relation of trust and confidence, the court points out that the production owners, that is, the holders of the first royalty assignments, were not entitled to possession of the leased property. Their assignments entitled them only to a certain percentage of oil produced and saved by the lessees. They entrusted their money, a considerable amount, to the lessees. Their chances for returns on their investments, assuming that oil existed, depend entirely upon the skill, industry, intelligence, honesty and integrity of the lessees. The lessees had the money and

independent power in the manner of its expenditure in drilling the wells, and the royalty holders were given no rights to even advise on these matters. The court concludes at page 7:

“If these facts did not create a condition in which the elements of trust and confidence between two groups must have existed, it would be hard to imagine one that did.”

The court then goes on to conclude (p. 9), that the transfer to Differding, one of the lessees, of the 5% overriding royalty, would adversely affect the interest of the original royalty holders, it having been found by the court below that the percentage of total production which the lessees would have left, after this assignment, would not be sufficient to pay the cost of operating the well.

All the reasons given by the court in the case cited for the existence of a fiduciary relationship apply with equal force in the case at bar. After the agreement of April 5, 1938, was terminated, the royalty holders and their assigns had no rights to possession of the well, had no voice in the management, and were required to look only to Treasure Company for the production of oil and the proper application of the proceeds of sale.

As to the question of whether or not there were any net proceeds to be distributed, it would seem that there should have been. The gross proceeds of sale of the oil produced by the well during its administration by Treasure Company amounted to over \$200,000.00 [R. 1236, and see p. 8 of

R. F. C. brief], and if the Government experts were anywhere near right in their testimony of what the expenses should have been [R. 815], then the participating royalty holders should have got substantial sums. At least there was a sufficient *prima facie* showing to justify an accounting, which the District Court refused to give.

So far as the *Vickers* case, and the pending accounting action brought by *Scoville, et al.*, are concerned, it is sufficient to say that the Bullens and Haywards are not parties to those actions. It would seem, however, that all royalty holders, whether parties to these actions or not, should be entitled to assert their liens in this action, wherein is the only property against which the liens could now exist. The liens attached to the leasehold, which has now disappeared, and the award stands in its place. In any other action, the royalty holders could recover only a personal judgment.

The case of *Florida Beaches, et al. v. Niagara Investment Co., et al.*, 148 F. 2d 963, cited on page 19 of the R. F. C. brief, does not support their position. In that case, the equities asserted attached to other lands in addition to those involved in the condemnation action. Even so, the court was disposed to keep the money intact until the other action had been determined, saying, in the language quoted at the bottom of page 20 and top of page 21 of the R. F. C. brief:

“The most it ought to do would be to keep the fund safe, if that is shown to be necessary, until the parties can protect their rights in it elsewhere.”

III. $\frac{1}{80.6}$

These Appellants Are Entitled to $\frac{1}{80.6}$ th of \$194,500.00 for Each 1% Participating Royalty Held by Them.

We have no quarrel with the R. F. C.'s contention (pp. 23 and 25 of its brief) that the award of \$194,500.00 was given for 100% of the working interest in Treasure Well No. 8. The question is: What part of that working interest is owned by the royalty holders, and what is owned by the lessee? As pointed out in our opening brief, p. 36, *et seq.*, that depends on what was assigned by the lessee to the royalty holders. The R. F. C. apparently does not question our argument, there made, that a 1% royalty assignment was an assignment of 1% of all oil to be

produced and sold, in other words, $\frac{1}{100}$ th of 100% of total production. This is quite different from $\frac{1}{100}$ th of 100% of the working interest, because, by stipulation, the working interest was only 80.6% of total production. The remainder, 19.4%, is the landowners' royalty (p. 13 of R. F. C.'s opening brief, note 8), which, of course, was not included in the valuation of the working interest. (R. F. C.'s opening brief p. 14.) It is simply a matter of

arithmetic that $\frac{1}{100}$ th of 100% is the same as $\frac{1}{80.6}$ th of 80.6%.

The award of \$194,500.00 represents *only the working interest*, as everyone concedes. Since the working interest is 80.6% of total production, the award represents 80.6% of the total production. To give the royalty holders only $\frac{1}{100}$ th of the award would, therefore, give them $\frac{1}{100}$ th of 80.6% of total production, which is manifestly less than

$\frac{1}{100}$ th of 100% of total production, the amount to which they are entitled by their assignments.

What the Bullens and Haywards are entitled to is $\frac{1}{80.6}$ th of 80.6% of total production, or $\frac{1}{80.6}$ th of \$194,500.00 for each 1% participating royalty held by them, which is \$2,413.00 for each 1%, or a total of \$4,826.00 to these appellants as the value of their participating royalties.

To give them less is to re-write their assignments.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY, and
FULTON W. HOGE,

*Attorneys for Appellants Herschel Bullen, Mary
H. Bullen, J. C. Hayward and Mary S.
Hayward.*

No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ADAMANT COMPANY, a Corporation, WALTER B.
SCOVILLE, JOE SEEPLER AND HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE
CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD AND MARY S. HAYWARD,

Appellees.

Reply Brief of Appellants Adamant Company, Walter
B. Scoville, Joe Seeples and Harry Wynn.

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LELAND J. ALLEN,

411 West Fifth Street,

AUL P. O'BRIEN

Los Angeles 13, California,

CLERK

*Attorney for Appellants, The Adamant Com-
pany, Walter B. Scoville, Joe Seeples and
Harry Wynn.*

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Appellees.

Reply Brief of Appellants Adamant Company, Walter
B. Scoville, Joe Seeples and Harry Wynn.

ARGUMENT.

The Assignee of the Interests of the Treasure Company, To-wit: The Reconstruction Finance Corporation, Is the Only One of Our Opponents Who Claim That Judge Westover Is Not in Error in Dividing the Jury Award into 100 Parts Instead of 80.6 Parts Even Though the Award Was for the Working Interests only, and There Are Only 80.6 Working Interests.

The United States Government as condemner has filed no reply to our Opening Brief questioning the arithmetical error of Judge Westover.

As pointed out at Page 23 of our Opening Brief (Adamant, Scoville, Seeples and Wynn) the Treasure Company never owned but 26.1 working interests.

Hence the Reconstruction Finance Corporation received only 26.1 per cent working interests as assignee of Treasure Company.

The award of the jury of \$194,500.00 for "total working interests," is divided into 100 parts by Judge Westover, hence each unit or 1 per cent is worth only \$1945.00. This amount multiplied by 26.1 units or per cents amounts to \$50,764.50 which is all that the Treasure Company or its belated assignee is entitled to receive.

And yet under paragraph X of the Conclusions of Law [R. p. 153], the Reconstruction Finance Corporation as assignee is given \$97,767.00, which is \$47,003.00 that they are not entitled to, as assignee of 26.1 units belonging to Treasure Company.

Query 1. Where did the excess of \$47,003.00 come from?

Query 2. How can the trial court increase the holdings of Treasure Company from 26.1 units to 51 units, or 51 per cent?

The appellants, Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn, respectfully submit that the Treasure Company never had more than 26.1 working interests or percents after it had accounted to the lessor for 19.4 per cent of production and after it had assigned the remaining production or portion of the leasehold to the Adamant Company, Scoville, Wynn, Bullen and Hayward, Johnson and Bodkin, *as shown on Page 23 of these appellants' Opening Brief.*

* * * * *

At pages 22 *et seq.* the R. F. C. attempt to construe the words: "total working interests in Treasure Well No. 8" to mean total leasehold estate.

A leasehold estate comprised working “interests *and landowner’s interests*, and hence “total working interests” is not the entire leasehold estate.

Perhaps the R. F. C. can explain to the Court that when the Treasure Company never had more than 26.1 per cent working interests it suddenly jumped to 51 per cent working interests.

* * * * *

At Page 23 the R. F. C. states as follows:

“If the word ‘total’ means anything when expressed in terms of arithmetic percentages, it means 100%.”

Certainly it means 100 per cent but of what? “Total working interests” does not mean total interests in the venture *because it excludes the landowners’ interests* which is part of the total leasehold but not a part of the total working interests.

* * * * *

At Page 27 of its Brief the R. F. C. states:

“* * * and that the fund must be divided as though there were a verdict reading: ‘For the entire leasehold estate of the Fletcher lease and the Burns No. 1 Lease—\$194,500.00.’ ”

It is too bad that the R. F. C. did not prepare their jury verdict to read as they now want it.

The above suppositious verdict is certainly ideal but not realistic as it contradicts the words of the real verdict.

Appellants submit that there is a mathematical error in dividing the jury award into 100 parts and thereby giving the Treasure Company (R. F. C.) more than it owned.

The Reconstruction Finance Corporation in Its Second Capacity as Assignee of Treasure Company Is Our Only Opponent Who Claims We Do Not Have an Equitable Lien Upon the Funds of the Jury Award Belonging to the Treasure Company.

The Reconstruction Finance Corporation claims that Treasure Company did not act "inconscionably" in the operation of Treasure Well No. 8 before it was seized and condemned by the United States Government.

The record shows that Treasure Well produced from 160 to 200 barrels of oil per day besides many cubic feet of gas for the period of three years and nine months before the Government seized the property, and that the sale price of that production as stipulated in the case at bar was \$205,411.69, and that these appellants who own and had established an interest of 47 per cent of total production were not paid one dime on their investment and ownership by Treasure Company and its president, the one person who really conducted all of the affairs of the Treasure Company.

(The above statement is subject to the fact that Mr. Wynn was paid a check for \$88.54 in the spring of 1939 out of the well's production.)

We believe that if Treasure Company stood before this Court (instead of its assignee, the Reconstruction Finance Corporation) there would be inquiries from the Bench, wanting to know, "why didn't you, the Treasure Company, return a profit to these appellants on their 47 per cent interest on such a large production?" The fact that the record shows that the Treasure Company preferred to hire lawyers and contest the rights of these appellants, can indicate only an unfair, unconscionable and inequitable at-

titude on the part of Treasure Company toward these appellants and their right to a portion of the profits from this oil well.

We submit that since the Resconstruction Finance Corporation stands in the shoes of the Treasure Company they cannot expect, in equity and good conscience, to receive any moneys due the Treasure Company under the award.

It Is a Vain Attempt for the Reconstruction Finance Corporation in Its Brief to Claim That We Must Rely Upon an Accounting Action Pending in Another Department of This Federal Court in Order to Arrive at the Amount of Our Equitable Lien.

In its other dual capacity the Reconstruction Finance Corporation as plaintiff and condemner produced the following testimony by its main expert witness, Dr. Dodge:

(Doctor Dodge.) "However, that became of no importance since the operating charges which we, I should say I—Mr. Sheldon and I, in making this appraisal, assumed to be the operating cost in the future, were below a \$10.00 per cent per month, which created a difference, or at least one of the differences between these various classes of per cents. Our operating costs which we postulated in making our estimate of the future value of this property were very much less than \$10.00 per month per cent, which was the breaking line between at least certain classes of these working interests of which you speak. * * * *and it is not governed or influenced by any possibly inflated idea of costs that might have been existing in the past.*" [Jury Trial, R. pp. 336-337.]

Dr. Dodge, Witness, testified further:

“Q. By the way, we never did ask you the exact figure that you allowed for cost per well per year?

A. \$3,200 per operating well-year.

Q. The same as Mr. Stoltz? A. The same as Mr. Stoltz.” [Jury Trial, R. p. 815.]

It is apparent that Dr. Dodge referred to the “inflated idea of costs that might have been existing in the *past*” as those costs which the Treasure Company was attempting to impose on this well operation before the condemnation proceeding.

The appellants submit that the Reconstruction Finance Corporation in its capacity as assignee of Treasure Company is bound by the evidence it produced in its capacity as condemner, *and to hold otherwise would allow R. F. C. to assert the opposite sides of a contention in the same court action.*

* * * * *

At pages 19 and 20 in its Brief, the Reconstruction Finance Corporation quotes from *Florida Beaches et al., v. Niagra Investment Co., et al.*, (148 F. 2d 963, 1945).

Before quoting from said case, they state:

“As before pointed out, the Adamant Company and Scoville, have already commenced an accounting action against Treasure Company, which is now at issue in another Court, but even if this action were not pending, we submit that this Court should question the propriety of a District Court adjudicating in its order of distribution disputes between claimants

to a condemnation award where the disputes are extraneous to the issue of determining those whose property interests have been seized and for which compensation is payable.”

The facts before this Court are *different* from the facts in the *Florida Beaches* case *supra*. In that case the Circuit Court definitely ruled in favor of these appellants and contrary to the contention of the Reconstruction Finance Corporation.

The Court stated as follows:

“We do not doubt that in distributing the funds in a condemnation proceeding, *the District Court can recognize not only the legal title, but also the plain equities in the property condemned* but we think it is going too far for it to undertake specific performance of a contract and an adjustment of equities about *other* lands also, between corporations of the *same* state over whose controversy it *did not* have *original jurisdiction*. The most it ought to do would be to keep the funds safe, if that is shown to be necessary, until the parties can protect their rights in it elsewhere. * * *” (Emphasis added.)

Florida Beaches, etc. v. Niagara Inv. Co., et al.,
148 F. 2d 963, 1945.

On May 31, 1949 (6 years and 8 months after this condemnation action was filed) the Reconstruction Finance Corporation and the Southern California Gas Company *took over* the *entire interests* of the Treasure Company in this oil well, and agreed to save the Treasure Company from all the claims of these appellants. We refer to said contract known as Adamants’ Exhibit I, Judge Beaumont, Feb. 23, 1950.

The Reconstruction Finance Corporation, the Southern California Gas Company, the Treasure Company, the Samarkand Oil Company, the Empire Oil Co. and the Trust Oil Company (the last four companies signed by G. de Bretteville, President) entered into a contract on May 31, 1949, in which all of the *real* and *personal* property belonging to Treasure Company, which, of course, includes *Treasure Well* and *its equipment*, was transferred to the Reconstruction Finance Corporation with the distinct understanding that the Reconstruction Finance Corporation *would save said four companies*, of which de Bretteville was president, harmless from any claims of the Adamant Company, Walter B. Scoville and Harry Wynn and others.

We quote from the language of said contract:

“It is further agreed that except as hereinbefore provided that the Reconstruction Finance Corporation and Gas Company will not look to the Trust Oil Company, *or any of the three companies*, for reimbursement for any damages which the Reconstruction Finance Corporation and the Gas Company may be called upon to pay in said condemnation action, to other parties to said action other than the three companies and Gus de Bretteville and Mrs. Gus de Bretteville.”

(See original Adamant Exhibit I—Judge Beaumont Feb. 23, 1950.)

The above contract takes away from these appellants the real and personal property of Treasure Company and subrogates the Reconstruction Finance Corporation in place of the Treasure Company.

We submit in the case at bar that all the equities of these appellants, of Treasure Company and Reconstruction Finance Corporation, are involved in the case at bar, that the Reconstruction Finance Corporation has assumed the burden of the claims of these appellants, and that there are no “other lands” or “corporations” nor any similar situations as is ruled upon in the *Floridia Beaches* case. In fact the italicized portion of that decision shows that this Court has jurisdiction in the case at bar to declare our equitable liens.

* * *

At page 3 of the R. F. C. Brief it states:

“The question, therefore, is: was Treasure Company, the original lessee, bound by the ‘two for one’ agreement?”

At page 5 of said Brief it stated that:

“that the deposit of such funds into the ‘Treasure Company Trust Fund’ was in accordance with the agreement between Treasure Company, The Adamant Company and Scoville. [Adamant-Scoville-Wynn Ex. ‘D’, R. 202, 1272.]”

The above statement is incorrect as said contract of April 5, 1938, being Exhibit “D,” did not require Mr. Scoville or the Adamant Company to pay any more than \$10,000.00, the amount mentioned in the contract. That said amount was paid prior to the Bullen and Hayward \$5,000.00 amount, and even Judge Vickers held that there was nothing in said contract requiring the Adamant Company and Scoville to raise any more money than the original \$10,000.00. There is no doubt that the Bullen

and Hayward fund went for the benefit of the leasehold and, if any obligation was created, the Treasure Company and Mr. DeBretteville are the ones who failed to carry out the obligation.

* * *

At page 5 the R. F. C. in its Brief states that "On the contrary such testimony supports the conclusion that whereas the President of Treasure Company refuses to assume responsibility for the "two for one" agreement [R. 1208] the obligation was admitted by Scoville to be his responsibility [R. 1209]."

So far as Mr. Scoville is concerned there is no such admission, and the R. F. C. is simply quoting *testimony* of Mr. Hayward, which is hearsay and not binding upon Mr. Scoville.

* * *

At page 6 of the R. F. C. Brief there is a quotation of a letter written by Mr. Hayward containing the following statement, among others:

"It is our contention now, and has been all the way through, that if Mr. Scoville guaranteed all of the money necessary to complete the well, then Mr. Scoville's royalties should be diverted from him to pay the debts which were incurred, and our small interest should come to us and not be used as they have been. * * *

So far as Mr. Scoville is concerned, he made no such guarantee, and is not bound by Mr. Hayward's statement in his letter. Said statement is hearsay so far as Mr. Scoville is concerned.

* * *

At page 8 *et seq.*, the R. F. C. discussed the question of equitable lien and attempted to dismiss it by ridicule, in accuracies and empty logic.

* * *

At page 8 they state that:

“The stipulation on gross proceeds was before the payment of landlord’s royalties [R. 1236], stipulated to have been 19.4 per cent of the total production [R. 746].”

The above overlooks the fact that the 47 per cent royalty under the assignments covered 47 per cent of *total* production so it becomes immaterial that 19.4 per cent of total production went to the landlord.

* * *

At page 9 of its Brief the R. F. C. states:

“No part of such gross proceeds handled by Treasure Company was owed to the Adamant Company, Scoville or Seeples for the period from December 8, 1938, to and including December 31, 1939 (for which there was an accounting) because of the express holding in paragraph II of the Vickers’ Judgment [Adamant, Scoville, Wynn Ex. ‘E,’ R. 202, 1273].”

The above accounting action referred to, showed that thousands of dollars went into equipment out of these moneys due Adamant and Scoville and *this equipment was taken over by the Government in its condemnation action.*

* * *

At page 9 the R. F. C., under No. 3, states:

“Any portion of such gross proceeds handled by Treasure Company from January 1, 1940, to the date of seizure, which may be owed to the Adamant Company, Scoville and other assigns, is subject to a surcharge for their respective *pro rata* shares in the completion, operating and maintenance costs and charges of Treasure Well because of the express holding in paragraph III of the Vickers’ Judgment, *supra*.”

As before stated, the completion costs charged against Adamant and Scoville went into the *res* or equipment which was taken over by the Government.

The operating and maintenance costs was testified to by the Government witnesses as \$3.30, a one per cent per month, in the case at bar.

* * *

At page 9 under designation 4 the R. F. C. states in its Brief:

“That the completion, operating and maintenance costs and charges of Treasure Well to the date of its seizure are ascertainable and should not be arbitrarily estimated at \$6,979.50 on the basis of testimony of experts in the evaluation trial, which testimony was addressed solely to prospective operating expense such as would have been incurred during the future economic life of the well without reference to costs and charges actually incurred prior to the date of seizure.”

We are not surprised that the R. F. C. would attempt to disallow the testimony of *their own expert witnesses* after they have discovered that such testimony is binding upon them.

In fact, Dr. Dodge, their chief expert, stated in effect that his testimony was “*not* governed or influenced by any possibly inflated idea of costs that might have been existing in the past” [Jury trial, R. 336-337].

It is refreshing to note that the R. F. C. concedes at page 16 of its Brief the following:

“Apparently this agreement contemplated a *joint ownership*, operation and control of several leasehold estates by the parties and the sharing of profits and loss therefrom, and it is possible that under its terms a ‘joint adventure’ was established. Be that as it may, this agreement is not before this Court for the reason that it was terminated under the express provisions of paragraph III of the Vickers’ Judgment, *supra*, and the District Court so concluded [Concl. IV, R. 151-152] such rights as the Adamant Company and Scoville may have enjoyed in the joint operation and control of Treasure Well were lost to them as of January 31, 1939, under the express provisions of Paragraphs I and IV of the Vickers’ Judgment, *supra*, and, accordingly, any reference in the Vickers’ Findings of Fact to a ‘joint adventure’ was addressed to the relationship between the parties which existed prior to that date.”

The above is an attempt to becloud the issue and make it appear that when the Vickers’ Judgment took away from the Adamant Company and Scoville the “joint operation and control” of the well, they were thereby deprived of their rights of property in the *proceeds* of the “joint adventure.” Such is not the case.

It must be pointed out that after the Vickers' Judgment the Adamant Company and Scoville were still entitled to their portion of the net earnings, which portion constitutes the basis of the equitable lien and they still held their royalty interests but simply lost joint control of the operation of the well.

* * *

At page 17 of its Brief the R. F. C. wonders if there was any fraudulent conduct on the part of Treasure Company toward the holders of royalty interests which would induce the Court of equity to impress an equitable lien on Treasure Company's share of the award.

We leave it to the Court if any person or persons who are entitled to 47 per cent of the gross production of an oil well which has produced \$205,411.69 should receive their portion of said production, subject to operating expense, testified to by the Government witnesses.

I think the Court will decide there is fraud some where. Such earnings were not paid over to the lawful owners.

* * *

The R. F. C. at pages 18 and 19 of their Brief claim that these parties

“seek equitable relief merely as alleged unpaid creditors and therefore bring to this Court a dispute which is entirely extraneous to the condemnation proceeding.”

The claims of Adamant Company, Scoville and Wynn were pleaded in our Answer in the condemnation case. We proved that those claims were based upon our rights as “joint adventurers” and not mere creditors.

The attempt to change our status by the above quotation is entirely without logic or support in a court of equity.

Conclusion.

POINT I.

The Adamant Company is entitled to 25/80.6 of the jury award of \$194,500.00 being the sum of \$60,328.75.

Walter B. Scoville is entitled to 16/80.6 of the jury award of \$194,500.00, being the sum of \$38,610.40.

Harry Wynn is entitled to 6/80.6 of the jury award of \$194,500.00, being the sum of \$14,478.90.

The above figures compensating them for their ownership of the respective stated percentages in the leasehold upon which Treasure Well No. 8 was drilled.

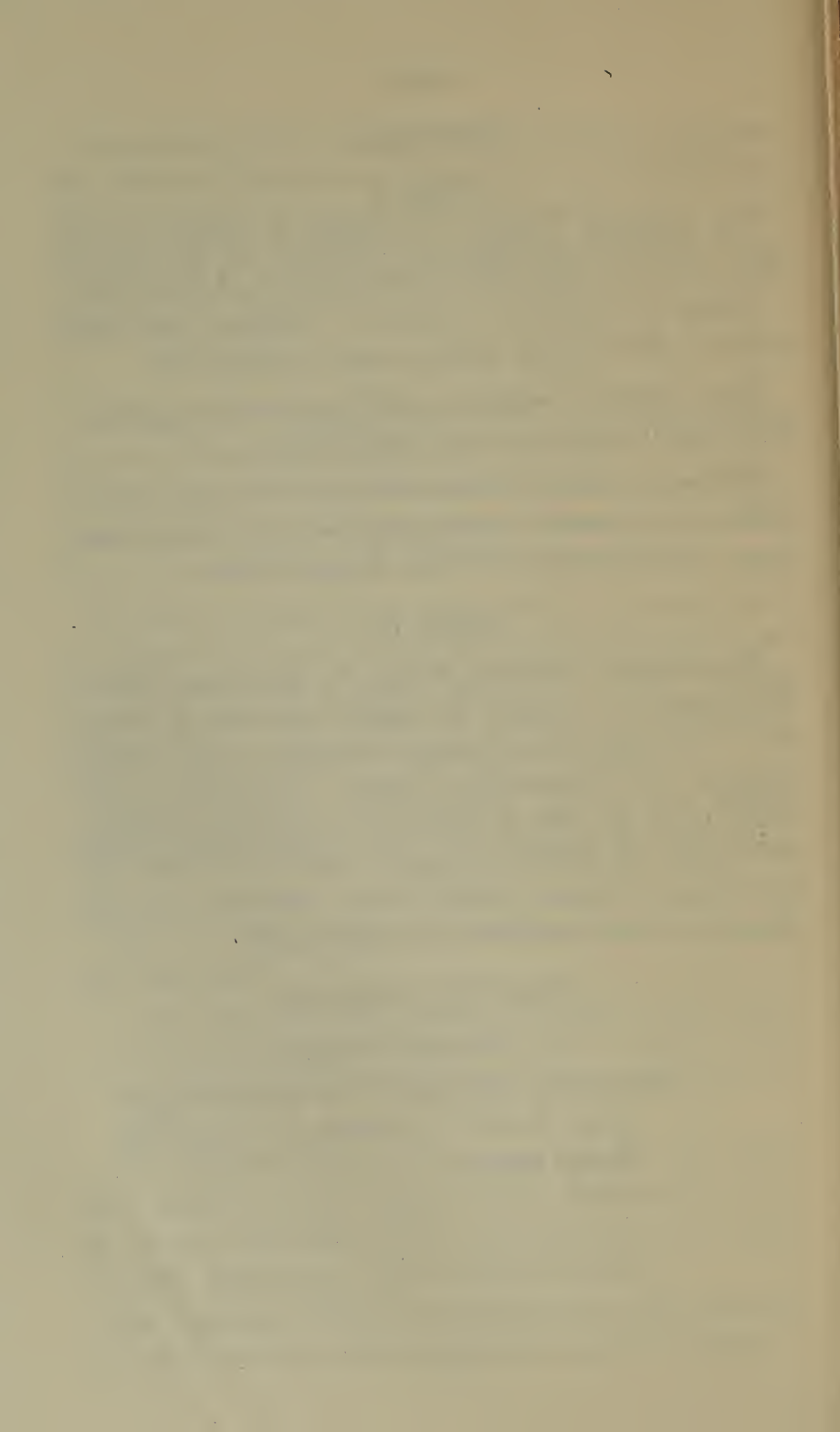
POINT II.

The Adamant Company, Walter B. Scoville and Harry Wynn have an equitable lien against all sums of money to be allocated to the Treasure Company or its belated assignee, the Reconstruction Finance Corporation, to the extent of 47 per cent of \$205,411.68, amounting to \$96,543.35, less the operating charge of \$6,979.50 (which the Government witnesses testified was a sufficient operating charge), or a net equitable lien of \$89,563.99.

Respectfully submitted,

LELAND J. ALLEN,

Attorney for Appellants, The Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn.



No. 12,961.

IN THE

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UNITED STATES OF AMERICA,

Appellant,

vs.

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HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
HAYWARD and MARY S. HAYWARD; RECONSTRUCTION FI-
NANCE CORPORATION, as Assignee of Treasure Company,

Appellees.

UNITED STATES OF AMERICA for the Use of RECONSTRUCTION
FINANCE CORPORATION, a Federal Corporation, Acting in Behalf
of DEFENSE PLANT CORPORATION, a Federal Corporation,

Appellant,

vs.

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HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C.
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RECONSTRUCTION FINANCE CORPORATION, Solely as Assignee
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ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE
and HARRY WYNN; HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD and MARY S. HAYWARD, and UNITED STATES
OF AMERICA,

Appellees.

(Continued on Inside Cover.)

Petition for Rehearing by Herschel Bullen, Mary N.
Bullen, J. C. Hayward and Mary S. Hayward.

WILLIAMSON, HOGE & CURRY,
417 South Hill Street,
Los Angeles 13, California,

*Attorneys for Petitioners, Herschel Bullen, Mary
N. Bullen, J. C. Hayward and Mary S. Hay-
ward.*

JUN 20 1952

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JOE SEEPLE and HARRY WYNN,

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Appellees.

HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and
MARY S. HAYWARD,

Appellants,

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V.

In addition to the foregoing, these petitioners request a rehearing on the question of the interpretation of the participating royalty assignments, that is to say, the percentage of production covered by such assignments, and that the decision of this point be also left to the accounting suits, where the court can take evidence of the actual interpretation which the parties have put upon the royalty agreements, in the allocation of income and expense.....	25
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CONSTRUCTION FINANCE CORPORATION,

Appellees.

Petition for Rehearing by Herschel Bullen, Mary N.
Bullen, J. C. Hayward and Mary S. Hayward.

Introductory Statement.

In view of the fact that this litigation, under the decision on the appeal rendered by this Honorable Court, will continue in other cases, that is to say, the accounting suits now pending between the parties, and also in view of the fact that the case involves many complex problems of fact and of law, it is of the greatest importance to the litigants that adequate guidance be furnished to the courts who will decide the accounting suits. This Petition for Rehearing is filed primarily for the purpose of asking that the Opinion be amplified to cover certain specific points in relation to the rights of the appellants Bullen and Hayward, and particularly that it state that certain points have *not* been decided, and are therefore still open for decision by the court or courts who will decide the accounting suits, if it becomes necessary to bring such suits to trial. The giving of such further instructions in the nature of declaratory relief might well result in a settlement of the case, but, in any event, it would expedite such continued litigation as there may be.

The following are the points upon which these petitioners, the appellants Bullen and Hayward, request a ruling:

- (1) Does the Court's statement that the two for one agreement is a personal covenant of Walter B. Scoville preclude the specific enforcement of that covenant against any share of the funds which another court, in an accounting suit, ultimately awards to said Walter B. Scoville?
- (2) Does the Court's reference to pending litigation include any pending accounting suits between the parties, whether specifically referred to in the opinion or not, so that the funds will be retained pending the disposition of all such suits?
- (3) Was the finding of the trial court that the two for one agreement was not binding upon Adamant Company or Treasure Company necessary for the decision of this case, so that it is now *res judicata*, or is that point also left open for subsequent adjudication in the accounting suits between the parties?
- (4) Does the affirmance of the judgment as to Reconstruction Finance Corporation mean that the share of the award which was allocated to it by the trial court is not subject to diminution by virtue of any decision which might be rendered against its predecessor, Treasure Company, in the accounting suits?
- (5) In addition to the foregoing, these petitioners request a rehearing on the question of the interpretation of the participating royalty assignments, that is to say, the percentage of production covered by such assignments, and that the decision of this point be also left to the accounting suits, where the court can take evidence of the actual interpretation which the parties have put upon the royalty agreements, in the allocation of income and expense.

I.

Does the Court's Statement That the Two for One Agreement Is a Personal Covenant of Walter B. Scoville Preclude the Specific Enforcement of That Covenant Against Any Share of the Funds Which Another Court, in an Accounting Suit, Ultimately Awards to Said Walter B. Scoville?

The statement of the Court (p. 13 of the opinion) that the two for one agreement was a personal covenant on the part of Scoville, and gave the Bullens and Haywards no interest in the well, or production from it, might well lead a court, in an accounting suit, to the conclusion that the Bullens and Haywards are not entitled to specific performance of this covenant on the part of Scoville. If so, the court might well conclude that they are no more than ordinary creditors of Scoville, and not entitled to come into the accounting suit and have Scoville's share of the award applied to the satisfaction of the two for one agreement.

As we understand the theory adopted by the Court in its opinion in this case, the holder of a participating royalty occupies a position in the nature of a stockholder in a corporation. He is something more than a stockholder, because a stockholder, of course, has no ownership of assets owned by the corporation, whether real or personal, *Eisner v. McAmber*, 252 U. S. 189 at 208, whereas the California cases now definitely establish that a royalty holder has an interest in real property. Cases cited on page 7 of the opinion.) On the other hand, the rights of a royalty holder, as this court has held, *In re Lathrap*,

61 F. 2d 37, are subject to payment of creditors of the enterprise, so that as a practical matter, upon a liquidation of the venture, the royalty holder stands in a similar position to that of a shareholder.¹

The condemnation of the property in this case by the government resulted in an enforced liquidation of the enterprise. The property in which the participating royalty holders had an interest is gone, and cannot be followed by them. The money award stands in place of the property, and the situation is analogous to that in which a corporation, partnership, or other business enterprise, has been dissolved, and its assets reduced to cash and made available for distribution to the owners of the business, subject to the satisfaction of the creditors of such business.

The Court has held in this case that, since participating royalty holders, notwithstanding their property interest, have no direct estate or divisible interest, the court wherein the condemnation is accomplished is not required to conduct the winding-up proceedings, and should not do so, at least where there are accounting suits pending in other courts in which the same object can be accomplished. The Court further held, as we understand it, that the money resulting from the forced sale of the assets, and therefore available for distribution to the creditors and the royalty holders in the proper proportions eventually determined in the accounting suits, will be held intact pending the disposition of such suits by settlement or adjudication.

¹Some of the discussion in the *Lathrap* case as to the nature of an oil royalty would no longer be apropos, in view of subsequent developments in the California law, but, so far as we know, the decision that royalty holders are investors who are deferred to the ordinary creditors of the venture has not been questioned.

The question then arises as to whether these petitioners, in such an accounting suit, will be entitled to an adjudication that Scoville's obligation under the two for one agreement shall be satisfied out of the share of the award to which he would otherwise be entitled or whether the petitioners must stand aside so far as the two for one agreement is concerned, and then attempt to collect from him on a parity with his other creditors.²

Scoville, who made the two for one agreement with the petitioners Bullen and Hayward, was the holder only of a participating royalty interest. He could not give the petitioners any greater interest than he had, but he could, and we submit did, subject whatever interest he did have to the satisfaction of the obligation to the petitioners under the two for one agreement.

It must be borne in mind in this connection that, limited though they were, the rights which Scoville had as a participating royalty holder were an interest in *real property*. (Page 7 of the opinion in this case.) Courts of equity, from time immemorial, have specifically enforced covenants to give an interest in real property, whether the interest to be given is one of ownership or by way of security, and the covenantee, under the theory of equitable conversion, is deemed to have an interest in the property, in equity, from the time the agreement is made. Indeed, this theory of equitable conversion was one of the considerations which led the Supreme Court of California to the conclusion that a participating royalty holder has some sort of property interest in the real property

²By other creditors, we mean creditors who did not advance money to this enterprise. Under the rule of *In re Lathrap*, creditors who advanced money for the drilling or operation of the well would be paid before Scoville's share was determined.

held by the lessee who issues the royalty. (*Schiffman v. Richfield Oil Co.* (1937), 8 Cal. 211, 64 P. 2d 1081.) The court there said, at the bottom of page 227 and the top of page 228 of the report in 8 Cal. 2d:

“The equitable doctrine of specific performance and equitable conversion as applied to contracts to buy and sell land, arose from the inadequacy of the remedy of damages due to the unique character of the subject-matter of the contract. In the case of royalty assignments the uncertainty in amount and value of the oil to be produced renders the subject of the contract unique.”

If Scoville had been the owner of the leasehold, there could be no question that his agreement to pay the Bullens and Haywards the sum of \$10,000.00 out of 15% of the gross production from the well would have given the Bullens and Haywards a legal property interest under the law of California. The case of *Recovery Oil Co. v. Van Acker* (1947), 79 Cal. App. 2d 639, 180 P. 2d 436, and the same case after retrial (1950), 96 Cal. App. 2d 909, 216 P. 2d 483 (hearing denied by Supreme Court), explicitly so held.

The instrument involved in the *Van Acker* case assigned “the proceeds from 15% of the oil, gas and other hydrocarbon substances produced and sold from the said premises until such time as said assignee shall have received the sum of \$20,000.00.”

The two for one agreement in our case provides:

“. . . these funds, \$5,000.00, to be included in the said necessary funds, to be repaid two for one *out of production* . . ., it being understood and agreed that the said two for one *out of production* is to be repaid *out of* the first 15% of gross production from the said well.” (Italics ours.)

[Pages 16 and 17 of the Opening Brief of these petitioners. The letter agreement itself is Exhibit 1 of these petitioners, and a printed copy is contained in the Record, Volume I, at pages 118-120.]

Does the fact that Scoville did not own the leasehold, but merely a participating royalty interest, prevent a court of equity from applying to the satisfaction of his obligation such interest as he had? The stating of the question, we submit, supplies the answer. No authority is needed for the proposition that a person who agrees to grant more than he owns will nevertheless be held to the obligation to grant what he has. It may be noted, however, that the principle has been applied in a case dealing with oil royalties. (*Schiffman v. Richfield Oil Co.* (1937), 8 Cal. 2d 211, 64 P. 2d 1081.) In this case, there were three trustees of a common law, or Massachusetts, trust, known as Monrovia Oil Company, which acquired a certain oil and gas sublease and drilled a well thereon. To finance the drilling of the well, the trustees issued participating oil agreements entitling the holders to stated percentages of the net proceeds from the sale of oil and gas produced from the well. All of the production remaining in the lessees after payment of landowner's royalty was disposed of in this manner. In other words, Monrovia Oil Company, the sublessee, which functioned through its three trustees, had nothing left but the bare legal title to the lease.

The trustees sold or purported to sell the leasehold estate to Brownmoor Oil Company, which in turn, and as part of the same transaction, sold it to Richfield Oil Company. The sale purported to be free and clear of any outstanding interests. The consideration paid by the purchaser was pocketed by the trustees.

The plaintiff Schiffman, one of the participating royalty holders, brought suit against Richfield, contending that Richfield had notice of his rights when it purchased, and that he was entitled to his share of the oil produced by Richfield, such share being that called for by his participating royalty. The trial court and the Supreme Court agreed with this contention, and the question arose as to whether Richfield got any share of the oil at all, in view of the fact that 100% of production was outstanding in the hands of landowners and participating royalty holders. It happened, however, that one of the trustees who participated in the sale of the property to Brownmoor, and then to Richfield, was himself the owner of certain units of the participating royalty, and the court held that Richfield would acquire this interest. This appears at page 221 of the report in 8 Cal. 2d. The court says near the bottom of page 221 and at the top of page 222:

“However, it would seem that the defendant company may have the right to a part of the oil produced by it under the sublease. There can be no doubt that the transfers to the Brownmoor Company and to the defendant Richfield Company were plainly worded to transfer the sublease free of any interest in plaintiff and others in the proceeds of oil to be produced, and if it had been within the power of the transferors they would have had that effect. R. L. Casner, one of the trustees and president of the Monrovia Oil Company, participated in the attempted assignments to the Brownmoor Company free and clear of any claims of plaintiff and others, and that company transferred its interest to the Richfield Company. Casner held 800 of the 2,000 oil units issued by Mon-

rovia Oil Company. In the circumstances shown he would be estopped to claim that such rights as he had at the time of the transfer to the Brownmoor Company did not pass to it and from it to the Richfield Company.”

Thus we have a clear holding by the Supreme Court of California, if any authority were necessary, that a person who purports to pass an interest in an oil lease, or in the proceeds of oil to be produced therefrom, which he does not own, will nevertheless be held to have transferred the part that he does own, even though the instrument of transfer makes no mention of it.

We have that precise situation in the case at bar. Under the holding of the trial court, as approved by this court, Scoville, in his capacity as the holder of a participating royalty, had no right or power to transfer to the petitioners Bullen and Hayward a gross royalty of the kind adjudicated in *Recovery Oil Co. v. Van Acker, supra*. He did attempt to do that very thing, however, and since he owned a 17% participating royalty (19% less the 2% which he assigned to these petitioners) [R. 142 and 145], these petitioners should get that participating royalty interest to the extent necessary to satisfy the two for one obligation; and, since the property is gone, this right should attach to Scoville's interest in the fund which takes its place.

The opinion of the Court as it stands, in the discussion on page 13, and particularly in the quotation from *Helvering v. O'Donnell*, may be such, however, as to lead a

trial court in an accounting suit to conclude that not only was the obligation created by the two for one agreement the personal obligation of Scoville but also that it created no specifically enforceable equity as against the property interest which Scoville owned. While this may be a matter of language, we submit that it should be cleared up.

Helvering v. O'Donnell (p. 13 of the Opinion), did not deal with the rights of the parties to the contract *inter se*. It involved the question of whether an interest had been created "in the oil and gas in place," so that the holder of the agreement would be entitled to a depletion allowance on the income therefrom. This is a technical question of tax law which should not control the rights of the parties as between themselves in equity. It might be noted further that in *Helvering v. O'Donnell*, the company which made the agreement in relation to the payment of the profits from the property did not then own the property, or any interest therein. In our case, Scoville did own an interest, to wit, a participating royalty, at the time he made the agreement.

In any event, we submit that if the Supreme Court of the United States, in *Helvering v. O'Donnell*, had been deciding whether O'Donnell had a specifically enforceable right to his share of earnings as against the company which made the agreement or its privies, he would have prevailed, and, whether it would have so held or not, the Supreme Court of California would certainly have done so, at least in the case of an agreement pertaining to

production from a certain lease or well. In all decisions by the Supreme Court of California, and all decisions by the District Court of Appeal of California in which the Supreme Court has denied a hearing, passing upon instruments which purport to give the holder a share of the oil from specific property, or a share, whether gross or net, of the proceeds of sale of such oil, where the question involved was whether or not the agreement was enforceable against the one who made it, and also against anyone taking title to the property with knowledge of the outstanding agreement, it has been held, *without exception*, that it was enforceable as against such persons. While the theory by which this result has been accomplished has been variously stated, the actual holdings have been uniform, and the cases extend over a period of seventeen years.

Western Oil & Refining Co. v. Venago Oil Corp.,
218 Cal. 733 (1933);

Callahan v. Martin, 3 Cal. 2d 110 (1935);

Standard Oil Co. v. J. P. Mills Organization, 3 Cal.
2d 128 (1935);

Dabney-Johnston Oil Corporation v. Walden, 4 Cal.
2d 637 (1935);

Schiffman v. Richfield Oil Co., 8 Cal. 2d 211
(1937);

Austin v. Hallmark Oil Co., 21 Cal. 2d 718 (1943);

Gavina v. Smith, 25 Cal. 2d 501 (1944);

Recovery Oil Co. v. Van Acker, 96 Cal. App. 2d
909 (1950) (hearing denied by Supreme Court).

The fact that the agreement in our case will be satisfied when \$10,000.00 has been paid does not change the situation. It simply means that the covenant we seek to specifically enforce is against the person who made it gives us something in the nature of a security interest. It is precisely the kind of agreement which was passed on by the California court in *Recovery Oil Co. v. Van Acker* (*supra*), and which was held in that case to be enforceable against a successor of the covenantor who was chargeable with knowledge of it. In the article on specific performance, 25 R. C. L., at page 288, the authors state:

“An agreement to execute a mortgage upon real property may be enforced in equity if the complainant has performed his part of the agreement by furnishing the money for which such mortgage was agreed to be given. Equitable relief is granted because the complainant does not trust to the personal responsibility of the defendant, and to refuse relief would be to deprive him of the security upon which he relies.”

In our case, the wording of the agreement that the money was to be paid “out of production” indicates that the petitioners did not look to the personal obligation of Scoville alone. In fact, his personal credit was not engaged. It was a personal covenant, but only in the sense that they looked to him to see to it that 15% of the production from the well was paid to the petitioners until they received the sum of \$10,000.00.

In this connection, it should be observed that at the time the two for one agreement was made with the petitioners, which was in September of 1938 [Ex. 1 of petitioners Bullen and Hayward], the well was in the possession of a committee set up to operate it under the agreement of April 5, 1938, between the lessee, Treasure Company, on the one hand, and Scoville and his family company, the Adamant Company, on the other hand. [Treasure Company's Ex. QQ.] The well had not been brought in. It was the money of these petitioners which put it on production. [Finding XXIV, R. 145.] Casing was not set until after November 10, 1938. (*Scoville v. de Bretteville*, 50 Cal. App. 2d 622 at 626.) The event which deprived Scoville and the Adamant Company of any rights of management and limited their royalty interest to the first well, to wit, the bringing in of the first well for less than 200 barrels per day, had therefore, not yet occurred. Furthermore, Scoville represented to these petitioners that he was acting on behalf of the committee. [R. 1191.] If in fact he had no authority to commit 15% of gross production to payment of the \$10,000.00, this is all the more reason for a court of equity to enforce the agreement against the interest he had.

Our belief that the Court did not intend to prevent these petitioners from reaching Scoville's share of the award, and that, although their rights are subject to prior rights of creditors of the enterprise, they are not on an equality with personal creditors of Scoville, is strengthened by the fact that the Court gave at least tacit approval to the recognition by the trial court of the doctrine of equit-

able conversion. At page 10 of the opinion, this Court refers to the fact that the trial Judge treated certain assignments which Treasure Company and also Scoville agreed to make to Wynn as having been actually made, though the agreements had not been completed by the execution of formal assignments.

In the last paragraph of the footnote on page 14 of the Opinion, the Court refers to that part of the agreement between Scoville and the petitioners wherein he agreed to assign to each a 1% participating royalty, and states "that this was likewise a personal undertaking to do something in the future." Scoville did in fact execute formal assignments of these two 1% interests [Finding XVII, R. 141], but we have no doubt that if he had not done so, the trial court, consistently with its holding in the case of Wynn, would have treated that as having been done which should have been done, and that this Court would have approved it.⁸

We earnestly request, therefore, that the opinion be modified or amplified to make it clear that the holding of the Court in regard to the so-called two for one agreement, while it is a holding that the agreement is a per-

⁸The footnote on page 14 makes the correct statement that persons holding warrants or rights to subscribe to stock are not considered stockholders. However, the reason they are not is that they have only an option to acquire stock. If the option is exercised and the money is paid they are entitled to specific performance, assuming that there is authorized stock available. *Helvering v. Southwest Consolidated Corp.*, 315 U. S. 194, at 201 (*semble*).

sonal covenant of Scoville, and gives no rights in the leasehold, and no other rights of which the trial court was required to take cognizance in this proceeding, was not intended as a denial of any specifically enforceable rights in these petitioners as against Scoville or his privies. If that was not the Court's intention, we request a rehearing, since we believe that the Court should be reluctant to hold, contrary to every decision by the Supreme Court of California on the subject, that an agreement to pay over the proceeds of sale of a part of the production from an oil well is not specifically enforceable as against the promisor, and anyone claiming through him who is chargeable with knowledge of the agreement.

Any holding which would preclude these petitioners from an accounting against Scoville would constitute a grave injustice to them. They provided the money which made the venture successful, but instead of obtaining the shares for which they bargained and which Scoville, at least, agreed should be paid to them out of production, they might well end up with nothing from the two for one agreement, except a small dividend, if any, after payment of the administrative expenses of Scoville's bankruptcy. In fact, it would appear from the record that the \$30,000.00 which was awarded to Scoville in this case will never become available for payment of his personal creditors. The record discloses [R. 96], that J. Orville Seepie claims that Scoville's participating royalties are held in trust for Seepie. This claim is apparently admitted by Scoville, since he and Seepie are represented by the same counsel.

II.

Does the Court's Reference to Pending Litigation Include Any Pending Accounting Suits Between the Parties, Whether Specifically Referred to in the Opinion or Not, so That the Funds Will Be Retained Pending the Disposition of All Such Suits?

This question is submitted because petitioners Bullen and Hayward do have an accounting suit pending in the State Superior Court for the County of Los Angeles against Scoville, Adamant Company and Treasure Company, and it may be important to continue that suit rather than to intervene in any other pending accounting suit, for the reason that a petition for intervention at this late date might be met by a plea of the statute of limitations.

It appears to us that the opinion of this Court is general in its reference to withholding the funds pending the outcome of accounting suits between the parties, but if the Court sees fit to modify or amplify its opinion in any other respect, it is hoped that some reference may be made to the pending State suit brought by these petitioners. The fact that such suit was brought is, we believe, in the record of this case although not in the printed portion thereof. The case is *Herschel Bullen, et al. v. Walter B. Scoville, et al.*, No. 447435, in the Superior Court of the State of California, in and for the County of Los Angeles.

III.

Was the Finding of the Trial Court That the Two for One Agreement Was Not Binding Upon Adamant Company or Treasure Company Necessary for the Decision of This Case, so That It Is Now Res Judicata, or Is That Point Also Left Open for Subsequent Adjudication in the Accounting Suits Between the Parties?

This point may become important to these petitioners, because, as noted above, J. Orville Seepie claims, and the claim is apparently admitted by Walter B. Scoville, that Scoville's participating royalties are held in trust for Seepie. [R. 96-97.] It is believed that any rights of Seepie are subject to those of petitioners (assuming that petitioners' rights are specifically enforceable in equity), but the claim indicates the need for putting the claim of the Bullens and Haywards upon as broad a base as possible.

All the testimony there is on the subject is to the effect that the original of the letter agreement was signed by the Adamant Company, as well as by Scoville. Mr. Bullen testified that Mr. Halverson, attorney for Scoville and the Adamant Company, had told him that the agreement was signed by the Adamant Company, by Helen Scoville, its secretary, and that is the reason he wrote down such a signature on his copy of the agreement. That testimony was as follows [R. 1218-1219]:

"Q. Mr. Bullen, I am going to show you Plaintiff's Exhibit 1, this letter of September 27, 1938, and call your attention to the writing down there in the left-hand corner, the statement, 'We agree to the foregoing'; is that your handwriting? A. Yes, sir.

Q. And under that, 'the Adamant Company, by Helen Scoville, Secretary.' A. That is my writing.

Q. Over at the left, 'Adamant Company, Seal.'

A. Yes, Adamant Company Seal over there.

Q. Will you explain how you happened to put that on there? A. That was because I understood from George Halverson that Adamant Company had signed by Helen Scoville, that it had been signed by her for the Adamant Company.

Q. Did you have a letter from Mr. Halverson to that effect? A. No, not a letter.

Q. He told you that, did he? A. Yes."

It will be recalled that the original of the letter agreement has been lost, and it is this copy of the agreement, bearing the actual signature of Scoville and the copied signature of the Adamant Company written down by Mr. Bullen, which is in evidence. [Ex. 1 of petitioners Bullen and Hayward.]

Mr. Halverson not only told Mr. Bullen that the letter agreement which provides for the two for one payment had been signed by the Adamant Company, but he also wrote a letter to Messrs. Young and Bullen, attorneys in Utah for Mr. Bullen and Dr. Hayward, in which he said:

"We have also, under date of September 27, 1938, a letter addressed to us by Herschel Bullen and J. C. Hayward directing on what terms the checks were to be turned over to the Treasure Company, and we merely had the Adamant Company and Walter B. Scoville Company and Walter B. Scoville agree to the terms contained in that letter."

This letter to the petitioners' attorneys is dated March 25, 1939, and is in evidence in this case as Petitioners' Exhibit No. 9. Mr. Halverson testified [R. 1240] that

he was at that time representing the Adamant Company. We therefore have an admission and representation made by the attorney for the Adamant Company, at a time when steps could have been taken to obtain a proper signature if it had not been signed, and we submit that there is not only evidence that the agreement was signed by the Adamant Company *and no evidence to the contrary*, but also that the Adamant Company is estopped to deny that it signed the agreement, if in fact it did not do so.

Mr. Halverson also testified in this case that the original had such a signature. His testimony was [R. 1239]:

“Q. Will you state whether or not you can testify that the signature of the Adamant Company by Helen Scoville, Secretary, was on the original of that? A. I can.

Q. What is your answer to that? Was it, or was it not? A. It was on it.

Mr. Hoge: That is all.

The Witness: Of course, I didn't see her write it, but I know it was there.

Q. (By Mr. Hoge): You saw the signature? A. It was produced by Mr. Walter B. Scoville.”

It was stipulated that Mrs. Scoville had authority to sign for the company. This appears at pages 1223 and 1224 of the record, as follows:

“Mr. Bodkin: I take it there is no controversy on the part of any of the folks represented by you that Mrs. Scoville was authorized to sign that agreement, that letter? When she signed on behalf of the Adamant Company, she was authorized to sign on behalf of Adamant Company?

Mr. Allen: This last letter?

Mr. Bodkin: The original contract, which counsel claims was the contract, the letter to George Halverson.

Mr. Allen: Let's see what you are talking about.

Mr. Bodkin: Do you have the number of that?

Mr. Hoge: That is Plaintiff's Exhibit 1.

Mr. Allen: You mean that form letter? Yes, she was authorized to sign that.

Mr. Bodkin: I am referring now to Exhibit 1.

Mr. Allen: What is the date?

Mr. Hoge: September 27, 1938, I believe.

Mr. Bodkin: September 27, 1938, yes.

Mr. Allen: Yes, she was authorized to sign *when she did that.*" (Italics added.)

The italicized portion may indicate a stipulation that Mrs. Scoville did sign the original. It was so understood by Mr. Bodkin. At page 1240 of the record, he makes the following statement, without drawing any comment from Mr. Allen:

Mr. Bodkin: It was stipulated yesterday that was her signature and she was authorized to bind the company, according to my recollection."

Last, but not least, the Adamant Company stood silent and made no attempt to show that the agreement was not signed by it.

Under these circumstances, it seems clear to us that the finding of the trial court that Adamant Company was not a party to the agreement was an inadvertent error. The finding was assigned as error by these appellants. However, it also seems to us that the finding was not essential, since the trial court took the view, which has been

affirmed by this Court, that it was not required to adjudicate rights under the two for one agreement in this proceeding. Unless the point is cleared up, however, it is not unreasonable to suppose that the petitioners will be met by a plea of *res judicata* in the accounting suit when they attempt to broaden the coverage of the two for one agreement.

IV.

Does the Affirmance of the Judgment as to Reconstruction Finance Corporation Mean That the Share of the Award Which Was Allocated to It by the Trial Court Is Not Subject to Diminution by Virtue of Any Decision Which Might Be Rendered Against Its Predecessor, Treasure Company, in the Accounting Suits?

We understand the Court's position to be that since Treasure Company, the assignor of Reconstruction Finance Corporation, was the owner of the leaseholds, it had an estate, a severable interest, in the property. Its interest was subject to valuation and distribution in this proceeding, whereas the holders of participating royalties assigned to them by the lessee, not having such estates or divisible interests, did not have the right to require the Court, in the condemnation case, to determine and evaluate their interests.

The Court, although recognizing their interest in real property, puts the royalty holders in a position analogous to that of shareholders of a business enterprise upon a winding-up of the business. It must be borne in mind,

however, that Treasure Company was the operator of the enterprise, and had the legal title to the property involved therein. It was also a "shareholder" in the sense that it retained a part of the beneficial interest in the net profits. It would be only in this capacity that it could receive a part of the assets. Upon a judicial liquidation, the assets in custody of the court are a trust fund for the payment of creditors and shareholders. (15A Fletcher Cyclopedic of Corporations, Permanent Ed., 90, Sec. 7386.)

As the holder of the legal title and the one who had the sole right to conduct operations, Treasure Company sustained a fiduciary relation toward the royalty holders even before the liquidation. (*Differding v. Ballagh*, 121 Cal. App. 1, 8 P. 2d 201.) It will therefore be properly called upon in the accounting suit to account to the royalty holders for their share of the net proceeds of all oil and gas produced from the well to the date of the condemnation by the Government, and going back as far as the end of the period covered by any prior accounting suits. (In this connection, although the Vickers judgment did not become final until 1942, the judgment brought the accounting only up to November 27, 1940, which was the date Judge Vickers made his finding. [R. 136, Finding III].)

Reconstruction Finance Corporation in this case stands only as the successor of Treasure Company, and had no greater rights than it had. (See Appellant's Brief of the R. F. C., p. 5.) It is there stated,

"Thus R. F. C. stands in the shoes of Treasure Company in this appeal and asserts no rights, as a dis-

tributee of the award, other than the rights of Treasure Company.”

Under these circumstances, the affirmance of the judgment as to Reconstruction Finance Corporation, and particularly the fact that, as we read the judgment, the money awarded to that company is not to be kept intact pending the outcome of the accounting suits, would seem to result in an unfair discrimination in its favor. Reconstruction Finance Corporation is, of course, financially responsible, and if the judgment does not intend to preclude the diminution of its share by the amount of possible recoveries against its predecessor, Treasure Company, in the accounting suits, then the point may not be of practical importance, although we believe it should be cleared up. If we had a case in which the operators of the property were irresponsible or dishonest, or both, as in *Schiffman v. Richfield*, the implications would be startling. The lessee could take the money, or what appeared to be its share of it, and the royalty holders would have the right to get uncollectible judgments.

Even in this case the point is a practical one. The R. F. C. is not a party to the accounting suits. To collect from the R. F. C. any judgment rendered in those suits against Treasure Company, would require a new action. A multiplicity of suits may, therefore, result, if the share of the award which belonged to Treasure Company and was by it assigned to the R. F. C., is not held intact along with the rest of the money.

V.

In Addition to the Foregoing, These Petitioners Request a Rehearing on the Question of the Interpretation of the Participating Royalty Assignments, That Is to Say, the Percentage of Production Covered by Such Assignments, and That the Decision of This Point Be Also Left to the Accounting Suits, Where the Court Can Take Evidence of the Actual Interpretation Which the Parties Have Put Upon the Royalty Agreements, in the Allocation of Income and Expense.

In view of the fact that one or more accounting suits are to proceed, in which the evidence will show how Treasure Company accounted for expenses and profits, that is to say, what percentage of each it allocated to the outstanding participating royalties, it would seem logical to withhold the decision on this point also, so that the question of what percentage of production was assigned by the royalty assignments can be determined by the way in which the actual accounting was made by the assignor.

In regard to the bearing of the Vickers decision on this point, we believe that the effect of that case, *Scoville v. de Bretteville*, 50 Cal. App. 2d 622 (1942), was simply to eliminate any rights of possession or management given to Scoville or the Adamant Company by the agreement of April 5, 1938 [Treasure Company's Ex. QQ], and also, to limit their royalty interest to the one well. This decision was based upon the terms of the agreement, and resulted from the fact that the first well, Treasure Well No. 8, was completed for less than 200 barrels of oil per day. There was no reason to confine the participating royalty, thus limited, to only one of the two leaseholds which furnish the legal drill site for the well, or to change or limit the percentage of production which was

retained in the one well. Any language in the findings or the judgment of the *Vickers* case which, taken alone, might indicate such limitations, should be read in context and in the light of the agreement which the judgment construed.

However that may be, the *Vickers* case can, in any event, have no effect upon the rights which these petitioners have under their 2% participating royalty assignments. These petitioners were not parties to that case, and their assignments of participating royalties were executed by Walter B. Scoville, their assignor, with the knowledge and consent of the operator, Treasure Company, and the approval of the Commissioner of Corporations, *before the Vickers litigation was commenced*. After the assignment, they held direct from Treasure Company, and no subsequent litigation between Treasure Company and Scoville to which petitioners were not parties could affect their rights.

The assignments from Scoville to these petitioners were dated October 22, 1938. [See the 3rd and 4th documents of Pet. Ex. 2.] The application for transfer in escrow, to which Treasure Company consented [5th document of said Ex. 2, p. 4 thereof], was filed November 7, 1938 (see stamp on first page of 5th document), and the Commissioner's order consenting to the transfer (6th document), was issued on the same date. The complaint in the *Vickers* case was not filed until June 1, 1939. [R. 136, Finding III.] Furthermore, when the agreement was made by Scoville with these petitioners, and when the assignments pursuant thereto were executed, the event which caused the reduction of Scoville's interest, to wit, the bringing in of the well for less than 200 barrels per day, had not occurred. As hereinabove noted, casing was not

set in the well until after November 10, 1938. (*Scoville v. de Bretteville*, 50 Cal. App. 2d 622 at 626.)

The rights of these petitioners in the two 1% participating royalties owned by them, therefore, do *not* depend upon the *Vickers* case. They depend upon the agreement between Treasure Company and Scoville of April 5, 1938 [Treasure Company's Ex. QQ], the royalty assignment by Treasure Company to Scoville [Ex. 2 of these petitioners, 2nd document], and the royalty assignments from Scoville to these petitioners (3rd and 4th documents), without giving any effect to the *Vickers* judgment. (Of course these documents are to be interpreted, as the Court did in the *Vickers* case, in the light of the subsequent bringing in of the well for less than 200 barrels per day, but, as far as these petitioners are concerned, the interpretation must be by this Court.)

We submit that the royalty assignments, on their face, which was all the trial court had to go on, are not susceptible of the construction that the royalty percentage assigned is a percentage only of the lessee's interest, but, on the contrary, the apparent meaning is that the assigned percentage relates to, and is a percentage of, all oil, gas, etc., produced from the described premises. The pertinent portion of the assignment to Scoville is as follows:

"TREASURE COMPANY, . . . does hereby sell, assign, set over, transfer and convey to

WALTER B. SCOVILLE

Nineteen one percent (19%) participating royalty interests in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises, located in the County of Los Angeles, State of California:

Lots Nine (9), Ten (10) and Eleven (11), Block Thirty-three (33), Tract 9809, as recorded in Book 145, Page 91 *et seq.*, of Maps, records of Los Angeles County.

Lots Seven (7), Eight (8), Thirty-five (35) and Thirty-six (36), Block Thirty-three (33), Tract 9809, as recorded in Book 145, Pages 91 *et seq.*, of Maps, records of Los Angeles County.”

These parcels constitute the property covered by the Fletcher and the Burns No. 1 Leases respectively, but there is no reference to the leases in the granting clause of the assignment.

The assignments from Scoville to these petitioners read, in the pertinent portions, as follows:

“ . . . Walter B. Scoville does hereby sell, assign, set over, transfer and convey to Herschel Bullen and Mary H. Bullen, as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor, one (1) One percent (1%) participating royalty interest in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises, located in the County of Los Angeles, State of California:” (Here follows the same description as in Scoville’s assignment.)

The assignment to the Haywards is in the same form.

Under the terms of the agreement of April 5, 1938, [Treasure Company’s Ex. QQ], the bringing in of the well for less than 200 barrels per day operated *ipso facto*, to limit the foregoing assignments to Treasure Well No. 8, but, by no stretch of the imagination can the agreement be construed to reduce the percentage of the royalty as thus limited.

Wherefore, these petitioners pray that a rehearing be granted, or for such other relief as the Court may deem just.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY,

By FULTON W. HOGE,

*Attorneys for Petitioners, Herschel Bullen, Mary
N. Bullen, J. C. Hayward and Mary S. Hay-
ward.*

Certificate of Counsel.

I, Fulton W. Hoge, counsel for Petitioners in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and is proper to be filed herein.

FULTON W. HOGE,

Attorney for Petitioner.

No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ADAMANT COMPANY, a Corporation, WALTER B.
SCOVILLE, JOE SEEPLE and HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE
CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD and MARY S. HAYWARD,

Appellees.

PETITION FOR REHEARING.

FILED

JUN 23 1952

LELAND J. ALLEN,

PAUL P. O'BRIEN

CLERK

411 West Fifth Street,
Los Angeles 13, California,

*Counsel for Adamant Company, Walter B. Scoville,
Joe Seepie and Harry Wynn, Appellants.*

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No. 12961.

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vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE
CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN,
J. C. HAYWARD and MARY S. HAYWARD,

Appellees.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

The undersigned, your petitioners, respectfully submit that they have been aggrieved by an opinion of Your Honors rendered herein on the 23rd day of May, 1952, in the respects hereinafter set forth, and pray for a rehearing of said matter:

I.

The Suspension of Appellants' Rights Is Contrary to the Trial Court's Rulings, and Is Inequitable.

The Opinion (p. 21) states:

"The cause is, therefore, remanded to the trial court with directions to stay the execution and enforcement of the judgment as to the appellants other than Reconstruction Finance Corporation until the actions pending in the state and federal court are determined, or the parties settle them and agree upon a manner of division of the award. The trial court will retain power to hold such further hearings as may be called for by the determination or settlement of the pending actions."

Had this appellate court been enformed of the proceedings before the jury and Judge Beaumont the above ruling undoubtedly would not have been made.

This case was tried before the jury upon the *theory* and *ruling* by Judge Beaumont that he would not and did not *suspend proceedings* in this condemnation action for the purpose of compelling Mr. Wynn to proceed with his action in the state court or of compelling the Adamant Company and Scoville to proceed with their accounting action in the federal court, *but that the question of ownership in Treasure well would be decided in the condemnation action.*

Judge Beaumont received the testimony as to the ownership of working interests pertaining to all 47 per cent working interests belonging to these appellants.

Furthermore, Judge Westover also received evidence pertaining to the working interests, even going so far as to set aside the sheriff's certificate of sale of 2½ per cent

of Mr. Wynn's working interests, holding that the sheriff's sale was void and that Mr. Wynn retained said 2½ per cent working interest and in addition thereto had a 2½ per cent working interest, or a total of 5 per cent, *which was subject only* to a maintenance and operation charge of *not to exceed* \$10.00 a month, a 1 per cent. [R. p. 87.] (Wynn also had an additional 1 per cent royalty.)

There was an agreement, amounting to a stipulation, between the attorneys for the government who represented the Reconstruction Finance Corporation, in the jury trial and the attorneys for these appellants that these appellants should establish their ownership in the case at bar.

While the stipulation mentioned Wynn specifically, the trial court applied his ruling to all of these appellants.

We quote from the record, as follows:

Stipulation and Ruling of Court.

“Mr. McPherson: With respect to the Wynn item or matter, it has been concluded that the Government will withdraw its objection to Mr. Wynn's testifying, and his testimony, and permit it to stand *both* as to the *Treasure well* and Burns' Leases 2 and 3, provided the withdrawal of this objection is understood as not conceding on the part of the Government that Wynn has such an interest in either as would entitle him to a distributive share of whatever award is made.

Mr. Allen: That is satisfactory.

Mr. Grivi: That is all right.

The Court: Then will you add that further part there, *that the matter of determination as to whether or not he is entitled to any distributive share is one to be made by the court after the verdict of the jury has been returned into court?*

Mr. McPherson: The reporter has just taken the court's (1092) statement, and that is agreeable.

Mr. Allen: We so understand and that is agreeable." [R. pp. 972-973.]

Government Refuses to Dismiss as to Mr. Wynn's Right to Establish His Ownership in Case at Bar.

"The Court: Do you move to dismiss the action, then, as to Mr. Wynn?

Mr. McPherson: No.

The Court: Well, if they are improperly joined, why should he not be dismissed?

Mr. McPherson: Because we are now on notice that he claims an interest, and I wouldn't dismiss a suit against anyone who claims an interest simply because I don't think he has one. (1026.)

The Court: Well, the Government is responsible for the action.

Mr. McPherson: For having joined him, yes." [R. p. 918.]

Judge Beaumont further stated:

"The Court: It is true, as Mr. Allen states, that all of the property of value within this area has been condemned, and *this is the time* for the defendants to present their evidence *showing their interests*. The Court would either have to pass upon it, *even though* it is the *subject of litigation in the State court*, or would have to suspend the proceedings without prejudice to the defendant until the determination in the State court. That was one of the things that the Court had in mind. The Court would be *reluctant* to do that without the consent of the defendants." [R. p. 895.]

Ownership of Appellants' Royalties Is Res Judicata.

"The Court: The Court is going to adjourn until tomorrow at 10:30, when we will go over these proposed instructions.

I guess you gentlemen realize that you are presenting a very difficult problem to the Court, to endeavor to decide it in the course of this trial.

The court may have to, in order that no injustice may be done to any party, suspend this proceeding, *which the court has a right to do, until determination of these other matters.*

There are two cases now, you state, in which these interests are considered. That is correct, isn't it?

Mr. Allen: Let me explain that. The State court action involves Harry Wynn alone for the accumulations on his 6 per cent and attacking this execution sale. Then the case before Judge Hall, which is before the Master, that involves an accounting of percents that are already recognized, *because Judge Hall ruled that the matter of ownership of the percents was res judicata* under the State court action and that (1028) involved an accounting *up to* the date of seizure.

The Court: Does that involve these present percents?

Mr. Allen: No. Mr. Wynn is not a party to that. It is the Adamant Company and Walter B. Scoville in the Federal Court.

The Court: Then Judge Hall's action does not involve the ownership of these per cents that you have just discussed?

Mr. Allen: No, your Honor, except that 1 per cent which he said was *res judicata* of the State Court, that formerly stood in Mr. Scoville's name, that might incidentally be involved, but he has ruled against the

defendants and said that is already decided in the State court. 44 per cent, in other words.

The Court: In whose favor did he say it was decided?

Mr. Allen: In our favor, Adamant and Scoville, 44 per cent.

The Court: Did that concern the 1 per cent interest of Mr. Wynn?

Mr. Allen: It concerned 44 per cent, which included Wynn and Bullen and Hayward, 3 per cent there." [R. pp. 919, 920, 921.]

These appellants are aggrieved by the ruling requiring them to finish the state court and federal court actions against Treasure Company which has *no assets* because it *assigned all its assets to the Reconstruction Finance Corporation*. [Adamant Co., et al., Ex. 1—Judge Beaumont—Feb. 23, 1950.]

Any judgment against Treasure Company in those two actions is worthless.

Furthermore, there is *no appeal* before this Circuit Court questioning the ruling of the trial judge that these appellants must and did establish their ownership of royalties in the case at bar and not in the two other actions referred to.

Since Your Honors made the ruling without knowledge of the actual proceedings in the District Court before Judge Beaumont, we request its reversal in order to maintain the theory and procedure adopted by all parties in the trial court.

II.

The Opinion Denies an Equitable Lien.

The Opinion states, in substance, that equitable liens must arise under contracts (p. 14)—that “the first assertion of a claim of equitable lien came in the Answer of the Adamant group filed on December 8, 1943” (p. 16), and that “it would be unconscionable to penalize either Treasure or its successor, Reconstruction Finance Corporation, for *the failure* of Treasure to live up to a promise to pay royalties which arose under a contract ambiguous in its terms, the meaning of which was not determined until May 18, 1942.” (P. 16.)

These appellants *submit that the above premises are not the grounds upon which an equitable lien is claimed by us.*

The right to our *equitable lien against this fund* of money did not arise *until the condemnation action was filed* September 28, 1942, and the fund was deposited *in lieu* of the land taken by the government. (That is the reason we *first* asserted an equitable lien in our Answer in the case at bar.)

Five per cent of Appellant Wynn’s ownership (he owns a total of 6 per cent royalty) is subject to only a *maximum charge* for maintenance and operation of \$10.00 per 1 per cent per month [R. p. 87] and the well produced \$205,411.39 in 3 years and 9 months.

Is it unconscionable to compel Treasure Company to pay the income out of this production instead of *evading its responsibility* and assigning all its assets to Reconstruction Finance Corporation, which corporation had notice of the claims of these appellants at least 5 years before it took over the assets of Treasure Company?

Is it unconscionable to compel both Treasure and Reconstruction Finance Corporation to recognize ownership of oil royalties established by a court decree *in the case at bar?*

The Opinion erroneously confines the right to an equitable lien “upon an ambiguous written contract or upon a fraudulent transaction.”

The equitable lien in the case at bar does not depend upon either of these two premises.

The appellants established the following working interests in Treasure Well No. 8 and its leasehold: 25 per cent working interests or oil royalties belonging to the Adamant Company; 16 per cent working interests or oil royalties belonging to Walter B. Scoville; 6 per cent working interests or oil royalties belonging to Harry Wynn.

The Supreme Court of California denied a petition for hearing on June 8, 1950, in the case of *Recovery Oil Co. v. Van Acker*, 96 Cal. App. 2d 909, and thus established the law to the effect that

“any obligation to pay (income upon an oil royalty) was not only a continuing one but she had *an interest in the land* which did not terminate until she actually received that amount of money. Her interest was vested *as an estate* and not as an lien. Her position was similar to that of a holder of a trust deed. The appellant, taking with notice, was in no position to demand relief in a court of equity as against the respondent, without recognizing and assuming the obligation which *continued to exist.*”

The law of condemnation and its procedure created the equitable lien by substituting the funds on deposit with the registry of the court in the place of the Treasure Well No. 8 leasehold.

The Opinion fails to recognize the correct basis for the creation of the equitable lien upon the funds to be allocated in the case at bar.

It must be pointed out that Treasure Company assigned all its assets to the Reconstruction Finance Corporation, and hence any judgment in an accounting action, either in the state court or in the federal court, would be *worthless* as same could not be collected against a corporation which has no assets. Treasure Company alone received the revenue from production amounting to \$205,411.69.

Under the above circumstances, an equitable lien can be created *by implication*, in accordance with the decision of the Circuit Court of Appeals, 6th Circuit, as follows:

“In the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. One may, by manifest intent and agreement, create a security for the discharge of his obligation and another discharging such an obligation, if not a volunteer, has the right to look to the fund for repayment.”

Cleveland Clinic Foundation v. Humphreys (1938),
97 F. 2d 849, 121 A. L. R. 163 (C. C. A. 6th)
(Writ of Certiorari denied in 305 U. S. 628,
83 L. Ed. 403, 59 S. Ct. 93.)

The Circuit Court of Appeals of the 8th Circuit held that monies advanced under oral agreement for the pay-

ment of future deliveries of coal created an equitable lien and charge enforceable against the estate in the hands of the trustee in bankruptcy.

Atchison T. & S. F. Ry. v. Hurley (1907), 153 Fed. 503 (C. C. A. 8th).

The opinion in the case at bar is contrary to the above rulings of the 6th and 8th Circuits, and contrary to the maxims of equity.

Furthermore, the opinion of this Circuit Court of Appeals decided an important question of California law in a way that *is in conflict* with the local decision of the California Appeals Court in *Recovery Oil Co. v. Van Acker, supra*, by denying that these appellants had an estate in the land condemned (transferred to the fund) until they received the income on their 47 per cent oil royalties.

The laws of condemnation were never intended to work an inequity by permitting Treasure Company to sign away all its assets to Reconstruction Finance Corporation and thus destroy the security or interest held by these appellants in the land taken in condemnation.

Under what equitable reasoning is there a penalty placed upon either Treasure Company or its successor, Reconstruction Finance Corporation, by compelling them to pay a just claim of which both companies had full knowledge.

Did those two companies agree to evade this liability to these appellants?

III.

The Designated Pragmatic Treatment Is Erroneous
and Not Sustained by the Evidence.

The Opinion (p. 17) states:

“The jury made an award of \$194,500.00 for the value of the lessee’s interest from which the participating interests were carved out. *The Government settled with the owners*” *True!*

The Opinion (p. 3) states:

“The jury rendered a verdict which recited ‘H-1-W-I’—being the total working interests in Treasure Company Well Treasure No. 8—\$194,500.00.” *True!*

The Opinion (p. 17) states:

“The trial judge adopted the figure 100 as representing the whole of the lessee’s interest, and this he proceeded to divide on a percentage basis *according to the percentages the parties themselves by contract and a state court by decree, had established.*” *Untrue!*

The above ruling does not state a true premise and is *contrary* to the *terms* of the contract referred to and the decree of the state court and hence *contrary to the evidence*.*

If the above premise were followed, the uncontradicted evidence *established the fact* that Treasure Company held *only 28.1 per cent*, and 28.1 per cent multiplied by \$1,945.00 (\$194,500.00 divided into 100 parts) equals \$54,654.50 and not \$97,767.00, which is erroneously al-

*The contract and the state court decree referred to, gave these appellants their percentage interest in *total production*, not in 80.6 per cent of production, which 80.6 per cent of production *was all that the jury verdict covered.*

located to Treasure Company and its assignee Reconstruction Finance Corporation.

The same contract and state court decree by elimination, left 28.1 per cent as the property of the Treasure Company—assigned to Reconstruction Finance Corporation.

Hence the ruling of this Circuit Court of Appeals is contrary to the evidence wherein it adjudges 51 per cent instead of 28.1 per cent as the portion of the award belonging to Reconstruction Finance Corporation.

The United States Supreme Court has held that

“this court may reverse findings of fact by a trial court where clearly erroneous.”

United States v. United States Gypsum Co., 333 U. S. 364, 395 (1947).

The Finding and Judgment allocating 51 per cent instead of 28.1 per cent of the award to Reconstruction Finance Corporation is “clearly erroneous.”

The error comes in separating the Lessor’s royalty interests from the total royalty interests, and yet claiming the award covered 100 per cent.

THE TOTAL AWARD WAS:

Lessors	19.40% or \$ 46,815.51	(On basis of jury award)
Working royalty	80.60% or 194,500.00	(Jury Award)
	<hr/>	
	100.00% \$241,315.00	

The Lessors were paid out of court. The over-all total according to the jury award would therefore amount to \$241,314.65, as follows:

19.40%	Leaseholders interest in award	\$ 46,815.51
28.10%	Treasure Co., or R. F. C.	67,809.52
2.5 %	Johnson	6,032.87
1.00%	Bodkin	2,413.15
25.00%	Adamant Company	60,328.00
16.00%	Walter B. Scoville	38,610.40
1.00%	Mr. & Mrs. Hurshel Bullen	2,413.15
1.00%	Dr. & Mrs. Hayward	2,413.15
6.00%	Harry Wynn	14,478.90
<hr/>		<hr/>
100.00%	Total	\$241,314.65*

By no stretch of the imagination can the 28.1 per cent royalty interest of Treasure-R.F.C. be stretched to become 51.00 per cent.

Total royalty interests were 100 per cent divided into two classes.

Wherefore, petitioners respectfully urge that a re-hearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

THE ADAMANT COMPANY,
JOE SEEPLE, and
HARRY WYNN,

By LELAND J. ALLEN,

Their Attorney.

(*35 cents difference by not carrying out fractions.)

Certificate of Counsel.

I, Leland J. Allen, counsel for the above named Adamant Company, Walter B. Scoville, Joe Seepie and Harry Wynn, Appellants, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

LELAND J. ALLEN,

*Counsel for Adamant Company, Walter B. Scoville,
Joe Seepie and Harry Wynn, Appellants.*

No. 12962

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA and ELEU-
TERIA BROWN ARENAS, Also Known as
Della Nicholson,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

DEC 10 1951

No. 12962

United States
Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA and ELEU-
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Appellants,

vs.

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the Attorney General,
Lands Division, Department of Justice,
807 Federal Bldg.,
Los Angeles 12, Calif.

For Appellees:

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
712 Rowan Bldg., 458 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 6221-PH

ELEUTERIA BROWN ARENAS, Also Known as
DELLA NICHOLSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR TRUST PATENT

The plaintiff complains of the defendant and for
cause of action alleges:

I.

That she is a citizen of the United States of
America and of the State of California; that she
is of Indian blood and descent, and is a duly enrolled
and recognized member of the Palm Springs or
Agua Caliente Band of Mission Indians of Cali-
fornia; that she was born in the year 1912; that she
is the adopted daughter of Lee Arenas, and all
her life has resided or maintained a residence upon
the Palm Springs Reservation of said Band of
Indians.

II.

That the Secretary of the Department of In-
terior of the United States, acting under the au-
thority of the Act of Congress of January 12, 1891
(26 Stat. L. 712-714) as amended June 25, 1910,

(36 Stat. L. 855-865) and March 2, 1917, (39 Stat. L. 976) did, on or about the 7th day of June, 1921, conclude and determine that, in his opinion, the aforesaid Mission Indians of California were so far advanced in civilization as to be capable of owning and managing land in severalty, and did thereafter, on or about the 1st day of July, 1921, appoint one H. E. Wadsworth as Special United States Allotting Agent at Large for the Mission Indian Reservations of California and said appointment became effective on said date; that in order to carry into effect the aforesaid opinion and determination of the Secretary of the Interior the said H. E. Wadsworth accepted, qualified and became the Special United States Allotting Agent at Large for the Mission Indian Reservations of California with authority of law in him vested to make allotments of lands in severalty to said Indians; that acting pursuant to said authority said special allotting agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs or Agua Caliente Reservation of Mission Indians of California in order that allotments thereof in severalty should be made by said Special Allotting Agent to the members of said Band of Mission Indians in accordance with the Statutes of the United States therefor provided.

III.

That thereafter, on or about the 21st day of June, 1923, said Special Allotting Agent, acting pursuant to instructions and directions given him by the Secretary of the Interior and the Statutes

of the United States therefor provided, did allot to plaintiff the following described lands, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 26, Township [3*] 4 South, Range 4 East S.B.M., comprising forty (40) acres, totaling 47 acres, as shown by said Special Allotting Agent's Schedule of June 21, 1923, said lands being a part of the Palm Springs Mission Indian Reservation in Riverside County, California; that thereafter said Special Allotting Agent issued and delivered to plaintiff a certificate of allotment to said lands under which plaintiff became entitled to an allotment trust patent thereto and to the sole and exclusive possession and use thereof.

IV.

That thereafter, on or about the 26th day of October, 1923, said Special Allotting Agent, acting under the authority vested in him by the Secretary of the Interior and the Statutes of the United States therefor provided, did state and represent to plaintiff's foster father, Lee Arenas, that the issuance and delivery of said certificate of allotment entitled plaintiff to enter upon and take possession of the lands allotted to her, and that said

*Page numbering appearing at foot of page of original Certified Transcript of Record.

certificate of allotment was and would be evidence of plaintiff's right to possess, hold and improve said lands, pending the issuance of a trust patent therefor to her; that thereafter plaintiff, believing and relying upon said certificate and the aforesaid statements and representations of said Special Allotting Agent, did improve said lands by erecting thereon buildings and other permanent structures and improvements suitable for use for residential, commercial and business purposes at a cost in excess of the sum of \$1,500.00 and that she would not have made said improvements and would not have expended said sum upon said lands excepting for said conduct, statements and representations of the Secretary of the Interior and said Special Allotting Agent.

V.

That thereafter, on or about the 5th day of January, 1927, the Secretary of the Interior did attempt to withdraw the allotments made by said Special Allotting Agent to the several members of the [4] Palm Springs Band of Mission Indians in the year 1923, and thereupon did instruct and direct said Special Allotting Agent to make reallootments of the lands previously surveyed and classified to such members of said Band of Indians as had previously made or should thereafter make voluntary selections of allotments from said lands; that thereafter, acting pursuant to said instructions and directions and at the request of plaintiff, said Special Allotting Agent, on or about the 9th day of May, 1927, did realLOT to plaintiff the above described lands and on said date did issue and de-

liver to plaintiff and plaintiff accepted a certificate of allotment to the above described lands, under which plaintiff became entitled to an allotment trust patent thereto and to the sole and exclusive possession and use thereof.

VI.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent and the aforesaid matters, facts and things, plaintiff became and at all times after the 21st day of June, 1923, has been, and is now, the equitable owner of the above-described lands with the improvements she placed thereon, and at all such times has been and is now entitled to an allotment trust patent thereto and to the sole and exclusive possession and use and enjoyment thereof free and clear of all claims and demands of the defendant whatsoever.

VII.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent, it became and at all times since the 21st day of June, 1923, has been, and is now, the mandatory duty of the Secretary of the Interior to issue to plaintiff a trust patent to the above-described lands, but notwithstanding said mandatory duty the Secretary of the Interior [5] has at all such times failed and neglected to issue said trust patent to plaintiff.

VIII.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent and the aforesaid matters, facts and things, the defendant is estopped to question, or deny, plaintiff's equitable title to the above described lands, or her right to an allotment trust patent thereto, or her right to the sole and exclusive possession, use and enjoyment thereof.

Wherefore, plaintiff prays:

1. That it be adjudged, ordered and decreed by this Court:

(a) That plaintiff is and was at all times mentioned in this complaint a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California.

(b) That on the 21st day of June, 1923, the United States of America allotted, and on the 9th day of May, 1927, reallotted in severalty to plaintiff, Eleuteria Brown Arenas, also known as, Della Nicholson, the lands described in Paragraph III of this complaint, and that plaintiff is entitled to an allotment trust patent to said lands from the United States of America.

(c) That the trust period of twenty-five years provided in the Mission Indian Act of 1891 (26 Stat. L. 712), during which the lands allotted and reallotted to plaintiff shall remain in trust shall begin to run from the 21st day of June, 1923.

2. That a copy of the judgment and decree of this Court be certified to the Secretary of the Interior of the United States of America.

3. That plaintiff have such other and further relief as justice and equity may require, including the costs of this action.

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE, and

ROBERT A. SMITH,

By /s/ JOHN W. PRESTON,

Attorneys for Plaintiff. [6]

State of California,
County of Riverside—ss.

Eleuteria Brown Arenas, also known as Della Nicholson, being by me first duly sworn, deposes and says: that she is the plaintiff in the above-entitled action; that she has read the foregoing Complaint for Trust Patent and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ ELEUTERIA BROWN
ARENAS.

Also known as:

/s/ DELLA NICHOLSON.

Subscribed and sworn to before me this 12th day of April, 1945.

[Seal] /s/ DAVID D. SALLEE,
Notary Public.

[Endorsed]: Filed Jan. 9, 1947. [7]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT UNITED STATES
OF AMERICA

Comes now the defendant, United States of America, and answers plaintiff's Complaint as follows:

I.

Answering paragraph I defendant denies that at or prior to May 9, 1927, plaintiff was a duly or otherwise enrolled or a duly or otherwise recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, but does admit that she was so enrolled and recognized at the date of the filing of her Complaint and at all times thereafter, and denies that plaintiff is the adopted daughter of Lee Arenas; and denies that said plaintiff, during all of her lifetime, has resided or maintained a residence upon the Palm Springs Reservation of said Band of Mission Indians.

II.

Answering paragraph II of said Complaint defendant admits the allegations therein contained

excepting that it alleges that the authority of H. E. Wadsworth as such Special Allotting Agent was limited to the authority to make [8] selections for allotment in severalty to members of the Palm Springs or Agua Caliente Reservation of Mission Indians of California who had chosen for themselves the lands to be selected for allotment to them; that such limitation upon the right, power, and authority of said Special Allotting Agent has been finally adjudicated and established by decisions of the United States Supreme Court and the United States Circuit Court of Appeals for the Ninth Circuit, in the following cases, to wit: *Arenas v. United States*, 322 U. S. 419, and *United States v. Arenas*, 158 F. 2d 730 (C.C.A. 9), *Certiorari denied*, 331 U. S. 842.

III.

Defendant denies that Special Allotting Agent H. E. Wadsworth allotted to plaintiff the lands described in paragraph III of her Complaint, but admits that he did prepare and deliver to the Commissioner of Indian Affairs a document entitled "Selections for Allotment" in and upon which he listed the lands described in paragraph III of the Complaint as his selections for allotment in severalty made for plaintiff.

Defendant denies that said Special Allotting Agent delivered to plaintiff a Certificate of Allotment to said lands or any part thereof, and denies that thereby, or otherwise, or at all, plaintiff became entitled to an allotment trust patent thereto or that thereby, or otherwise, or at all, plaintiff

became entitled to the sole or exclusive possession or sole or exclusive use or any possession or use of said lands or any part thereof.

IV.

Defendant denies each and every of the allegations contained in paragraph IV of plaintiff's Complaint.

V.

Answering paragraph V of plaintiff's Complaint, defendant admits that following the making of the 1923 selection for allotment the Secretary of the Interior instructed and directed H. E. Wadsworth, as Special Allotting Agent, to make new selections for allotment for and in behalf of such members of the Palm Springs Band of Mission Indians as should make voluntary selections for allotment out of the unallotted lands of said Band adjacent to the Town of Palm Springs, California, and that, thereafter, on or about May 9, 1927, said Special [9] Allotting Agent did prepare and submit to the Commissioner of Indian Affairs a new schedule of Selections for Allotment in and upon which the lands described in paragraph III of plaintiff's Complaint were designated and identified as the lands selected for allotment in severalty to plaintiff.

Defendant further admits that on May 9, 1927, said Special Allotting Agent did issue a writing entitled "Selection for Allotment" in which he certified that said lands described in paragraph III of plaintiff's Complaint had been selected by plaintiff.

Defendant denies that by reason of the acts of

said Special Allotting Agent, or otherwise, or at all, plaintiff became entitled to an allotment trust patent to said lands or became entitled to the sole or exclusive possession or became entitled to the sole or exclusive use thereof.

Except as herein admitted, defendant denies all of the allegations in paragraph V of plaintiff's Complaint.

VI.

Defendant denies the allegations contained in paragraph VI of plaintiff's Complaint, but admits that if plaintiff can establish that on and after January 8, 1927, she was a member of the Palm Springs Band of Mission Indians; that she then was and now is the adopted daughter of Lee Arenas; that the selections of the lands described in paragraph III of plaintiff's Complaint were chosen and made by someone authorized to act for and in behalf of plaintiff (who was then a minor and who, plaintiff alleges, was then incompetent to make such selection in her own behalf) prior to May 9, 1927, then plaintiff has done and performed everything that she could do and which the law then required her to do as a condition precedent to obtaining a trust patent under the provisions of Title 25 U.S.C., Section 345; 31 Stat. 760, under the principles established in the final decisions in the cases of *Arenas vs. United States*, 322 U. S. 419, and *United States vs. Arenas*, 158 F. 2d 730 (C. C. A. 9), *Certiorari denied*, 331 U. S. 842, and that by reason thereof plaintiff has become entitled to the issuance to her, in the manner provided by law, of an allotment

trust patent in severalty to the lands described as Parcels (a), (b), and (c) in paragraph III of plaintiff's Complaint, effective as of and to commence to run from May 9, 1927, but [10] that failing proof of such conditions precedent, she is not entitled thereto.

VII.

Defendant denies each and every allegation contained in paragraph VII, excepting that it admits that the Secretary of the Interior of the United States has not issued or delivered to plaintiff an allotment trust patent in severalty to the lands described in paragraph III of plaintiff's Complaint.

VIII.

Plaintiff denies each and every allegation contained in paragraph VIII of plaintiff's Complaint.

Wherefore, defendant demands judgment that plaintiff take nothing by her Complaint and that it be dismissed with costs.

Dated November 25, 1947.

JAMES M. CARTER,
United States Attorney,
IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant,
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 25, 1947. [11]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR THE
ADMISSION OF EVIDENCE

It Is Hereby Stipulated in the above-entitled cause that the Order of Submission therein be set aside and those two certain Exhibits found in case No. 1321 styled, "Lee Arenas vs. United States" and designated as Exhibit F-1 No. 17 and Exhibit F-1 No. 19 be received as evidence in the above cause. Copies of said Exhibits above referred to are attached to this Stipulation and designated as Exhibits "A" and "B" respectively.

Dated this 9th day of April, 1948.

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,

By /s/ JOHN W. PRESTON,

Attorneys for Plaintiff. [13]

JAMES M. CARTER,

United States Attorney.

IRL D. BRETT,

Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,

Attorneys for Defendant.

ORDER

It Is Hereby Ordered, that pursuant to the annexed Stipulation the Order of Submission heretofore made is hereby set aside and the documents set forth in said Stipulation are hereby received in evidence.

Dated this 12th day of April, 1948.

/s/ CHARLES C. CAVANAH,
Judge. [14]

EXHIBIT A

Exhibit F-1 No. 17

“Exhibit No. 17

“Jan. 26, 1923.

“Mr. Harry E. Wadsworth,
“Special Allotting Agent,
“Thermal, California.

“Dear Mr. Wadsworth:

“Your attention is again invited to the correspondence relative to the allotting of a portion of the lands of the Torres-Martinez Indian Reservation.

“This will advise you that the Tribal Roll, recently prepared and forwarded to the Office by you, has been accepted as correct and will constitute the basis for assigning the allotments. It is noted that there were 213 persons eligible to receive allotments at the date on which that roll was completed. It is also observed from the Classification Schedule,

submitted with your report of June 27, 1921, that there are within the Torres-Martinez Reservation approximately 11,000 acres of land, classified as irrigable, in addition to that not susceptible of irrigation.

“It is evident, from the above data, that there is land available for allotting each enrolled Indian 40 acres of the land classified as irrigable, and it has been decided to take action along that line. You are directed, therefore, to begin the allotting of said Torres-Martinez lands as soon as your present assignment has been completed, which you have stated would be about February 1, 1922.

“The land involved has already been surveyed into townships and sections and the survey accepted by the General Land Office. You are instructed to assign the allotments in tracts of approximately 40 acres each of irrigable lands only. It is very important that the allotment selections be described in legal sub-divisions and made to conform to the public survey. If, however, in some instances it seems necessary to approve selections that [15] do not conform to the survey, such cases should first be referred to the Office, with rough plats and other data showing the conditions obtaining, and you will receive instructions as to the advisability of listing such selections on the schedules. It is assumed that you have satisfactory plats and maps of the territory to be allotted, in your possession, or available for consultation.

“No allotment selection should be permitted on any land other than that classified as irrigable, since

it is contemplated to encourage the placing of each allotment, or at least a portion thereof, under irrigation as soon as possible. The lands classified as not susceptible of irrigation will remain in the tribal status pending future disposition.

“The allotments herein authorized will be made under the provisions of the Act of Congress of February 8, 1887 (24 Stat. L., 388), as amended by the Act of June 25, 1910 (36 Stat. L., 855), and supplemented by the Act of March 2, 1917 (39 Stat. L., 969-76). The allotment selections should be listed, as made and reported, and Certificates issued therefor on Form 5-201. Care should be exercised in that connection to issue the Certificates only in cases where you are satisfied that the person for whom the land is selected is living. The names of those Indians who shall have died since the roll was prepared should be disregarded, and on the other hand, the names of children born, to duly enrolled members, may be added to the roll and may be allotted up to such date as you may set for the completion of the allotment schedules.

“Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you.

“If any Indian has acquired an equitable right to a specific [16] tract of land by reason of occupancy, improvement, and use, such right should

be recognized and protected as fully as possible by permitting him, or members of his family, to select such land. Each allotment selection should be marked in a definite manner with corner posts, and the same should be pointed out to the allottees whenever it is practicable.

“The allotment schedules should be made in triplicate, on Form 5-176. On each schedule should be placed the allotment number, the name of the allottee, relationship, sex, age, and the description of the land as indicated by the column headings. You should allow not less than three lines between the allotment descriptions, to provide for available space that may be needed in the future to enter new descriptions if modifications should be necessary. On the last page of each copy of the schedules should be placed a certificate showing the date on which the listing of allotment selections began, also the date on which said work closed, together with a statement to the effect that the allotments shown thereon were made in accordance with the provisions of the Acts of Congress herein before cited, and said certificate should be dated and duly signed by you. When completed the original and duplicate copies of the schedules should be transmitted to the Office and the triplicate copy placed in the Agency files.

“All allotment selections should be reproduced graphically on tracing cloth township plats (Form 5-177a), and the name of each allottee, and the allotment number, should be shown on the diagram.

Only one copy of said plats should be prepared, which copy should be forwarded to the Office with the schedules.

“Monthly reports in duplicate showing the status of the work should be submitted to the Office on Form 5-250, within ten days after the expiration of the month. All doubtful questions which may arise should be referred to the Office and specific instructions will be given for your guidance. The necessary forms for use in [17] the work are being sent to you under separate cover, and your request for any additional supplies found necessary may be made on Form 5-262.

“Sincerely yours,

“CHAS. H. BURKE,

“Commissioner.

“Approved: Jan. 26, 1922.

/s/ R. M. GOODMAN,

“Assistant Secretary.

“Copy to: Northern Mission Agency. [18] 1-PG-20.”

EXHIBIT B

Exhibit F-1 No. 19

“Exhibit No. 19

“Nov. 29, 1922.

“Mr. Harry E. Wadsworth,

“Special Allotting Agent,

“Thermal, California.

“Dear Mr. Wadsworth:

“Reference is again made to the correspondence in regard to allotting the lands on the Cabazon and the Augustine Indian Reservations under the jurisdiction of the Mission Agency in California. You are hereby instructed to proceed with the allotting of those two reservations as soon as the surveying crew, which will be detailed by the General Land Office, reports for duty.

“This letter will also be your authority to proceed with the allotting of the other Mission Indian Reservations in the order in which it may be deemed advisable to take them up in the progress of your work. All such allotments will be made under the laws cited in the letter of instructions to you of January 26, 1922, pertaining to the Torres-Martinez Reservation, and you will also be guided by the other general instructions contained in that letter.

“It is observed from the classification schedule and your report thereon covering the Cabazon and Augustine Reservations, which were recently submitted to the Office, that there are thirty Indians

eligible to receive allotments on the Cabazon Reservation, and that there will be a sufficient area of good land to allot them forty acres each. It is further noted that there are sixteen Indians eligible to receive allotments on the Augustine Reservation and that there will be sufficient land to make those allotments in forty acre tracts also.

“Upon examining the records it is noted that irrigation projects are being developed on each of those reservations, [19] there now being approximately 75 acres under ditch at Cabazon and 50 acres at Augustine. Great care should be exercised in allotting the land that is already under irrigation and the equitable rights of the parties now using those lands should be protected as fully as practicable without detriment to the band as a whole.

“The irrigation reports in the Office show that the source of water supply for each of those reservations consists of wells constructed by the Government, six wells at Cabazon and three at Augustine.

“It is the opinion of the Office that it will be very advantageous if a small tract of land on which the wells are located, or if they are not in a group, a small tract on which each well is located, can be segregated by the surveyor and reserved from allotment. It is desired therefore that you endeavor to make some such adjustment in the matter if it is at all practicable.

“The necessary forms for use in the work are being forwarded to you under separate cover and your request for any additional supplies found

necessary may be made on Form 5-262. Copies of the township plats as photographed from the records of the General Land Office will also be furnished for your reference.

“Sincerely yours,

“CHAS. H. BURKE,

“Commissioner.

“11-CMS-27

“Approved: Nov. 29, 1922.

/s/ “E. C. FINNEY,

“First Assistant Secretary.”

[Endorsed]: Filed April 12, 1948. [20]

[Title of District Court and Cause.]

DECISION

Cavanah, District Judge.

This is an action brought by the plaintiff of Indian blood and descent for a decree that she is, and was, at all times mentioned in her complaint a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, and that on June 21st, 1923, the United States allotted, and on May 9th, 1927, re-allotted in severalty to her the lands in question from which she asserts that she became, and is now, entitled to an allotment trust patent thereto

from the United States and the sole and exclusive possession and use thereof.

Plaintiff was born in the year 1913, and was taken at the age of three years to live as one of a family of Lee Arenas on the reservation who was a regularly enrolled member of the Band of Mission Indians. She lived and remained as a member of his family and given the name of Arenas until some time subsequent to the allotment proceedings of 1927 involved here.

It will be observed that this is a special proceeding brought under Title 25, section 345, U.S.C.A., which provides that a decree of a United States District Court in favor of [21] any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. The Supreme Court in the case of *Lee Arenas v. United States*, 322 U. S. 419, 88 L. ed. 1363, has recognized the right of an Indian to adjudicate his rights under this statute and the decree of the court shall stand in lieu of the Secretary's action if the Indian was unlawfully denied a patent to an allotment to which he was entitled. Congress has defined this right as to all allotments to be selected by the Indians, heads of families selecting for their minor children, and the agent of the Government shall select for an orphan child appointed for that purpose. Title 25, Section 332 U.S.C.A.

The record discloses that and prior to the allotment proceedings of 1927, the plaintiff was a duly

enrolled member of the Palm Springs Band of Mission Indians, as her name appears in the census or Tribal Roll of the members of the Palm Springs Band, in 1923, and 1927, and also in the schedules of Selection for Allotments for 1923 and 1927, and was enrolled as a member of the Palm Springs Band of Mission Indians.

On March 19, 1927, a written request was made to Commissioner of Indian Affairs through H. E. Wadsworth, Special United States Allotting Agent that she be given an allotment of land of the reservation and that a trust patent covering the same be issued in which her name appears by "Lee Arenas Father." Thus it will be seen that the Act of Congress makes it mandatory on the Special Agent of the Government to select allotments for an orphan child when in making selections for Indians. This was done by the Special Agent of the Government [22] for the plaintiff who was an orphan at the time and an enrolled member of the Palm Springs Band of Mission Indians. The Allotting Agent was specially authorized by the Commissioner of Indian Affairs to make selections for orphans and minors or by some one who he may regard as competent to do so. While the father of the plaintiff was then living and she was living with Lee Arenas who made the selection for her, the Special Agent of the Government accepted and regarded Lee Arenas as competent to make the selection. These are the two thoughts which, under the evidence, make the selection and allotment of the plaintiff legal and entitle here to be considered

as being duly enrolled and a recognized member of the Palm Springs Band of Mission Indians, and entitled to an allotment trust patent to the lands selected and allotted to her.

It may further be said that the claim of the plaintiff does not rest upon any right to inherit from, or through, Lee Arenas, but is, as has been said, based upon her right as a duly enrolled member of the Palm Springs Band of Mission Indians to an allotment of the lands involved here situated in the Palm Springs Reservation.

The further question presented relates to whether the plaintiff's attorneys should be allowed reasonable compensation as an attorney fee for their services and reimbursed for costs and expenses made by them in the suit and declared a lien on the allotment.

This being an equitable action, the court may retain jurisdiction of the cause and parties for the purpose of allowing and fixing attorney fees and costs and expenses of suit as between the attorneys and client at some future date. *Sprague v. Ticonic National Bank*, 307 U. S. 161, 83 L. ed. 1184; *United States v. Equitable Trust Co.*, 283 U. S. 738, [23] 75 L. ed. 1379; *United States v. Anglin & Stevenson*, 145 F. 2d 622; and whether a lien should be declared on the allotment involved here, to the extent of whatever amount is hereafter found due as such attorney fees and costs and expenses.

I find that the record does not contain evidence to enable the court at this time to determine that question. As counsel for the plaintiff at the time

of submission of the case and in their brief urged the court to retain jurisdiction of the cause and parties for that purpose, I have concluded to do so and hear and determine the question. The parties are granted twenty days within which to present testimony and briefs bearing upon the question as to whether the court should allow and fix attorney fees and the amount thereof for counsel for the plaintiff, and reimburse them for whatever amount they have necessarily expended, if any, in connection with the suit as costs and expenses; and whether they should have a lien on the allotment involved in the case, or to decree an undivided interest in the allotment of the amount of such allowance. In other words, that question is left open to be finally decided by the court. Should counsel decide to submit the evidence upon depositions and further briefs, that is satisfactory to the court. When this final question is disposed of by the court, counsel for the plaintiff will then prepare findings of fact and conclusions of law and decree covering the conclusion here reached and to be further determined by the court.

[Endorsed]: Filed May 20, 1948. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 30th day of March, 1948, before the Honorable Charles C. Cavanah, Judge, sitting without a jury, a jury having been expressly waived, John W. Preston, Esq., Oliver O. Clark, Esq., and David D. Sallee, Esq., appearing as counsel for the plaintiff, and James M. Carter, United States Attorney, and Irl D. Brett, Special Assistant to the Attorney General, appearing as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties and the argument of counsel, and being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the Court in said action are hereby [25] made:

Findings of Fact

I.

That the plaintiff, Eleuteria Brown Arenas, is a citizen of the United States of America and of the State of California; that she is of Indian blood and descent and is, and has been ever since a date prior to the 21st day of June, 1923, a duly enrolled and recognized member of the Agua Caliente or Palm Springs Band of Mission Indians of California; that she was born in the year 1912, and since she was about three years of age has at all

times resided upon the Palm Springs Reservation of said Band of Indians.

II.

That from about the year 1915 until after May 9, 1927, the plaintiff was a member of the family and resided in the home of Lee Arenas and Guadalupe Arenas, his wife; but plaintiff was never adopted by the said Lee Arenas and Guadalupe Arenas, or either of them.

III.

That on or about the 7th day of June, 1921, the Secretary of the Department of Interior of the United States of America, acting under the authority of the Act of Congress of January 12, 1891 (26 Stat. L. 712-714), as amended on March 2, 1917 (39 Stat. L. 976), did conclude and determine that all of the members of the above-mentioned Band of Mission Indians of California were so far advanced in civilization as to be capable of owning and managing land, in severalty, and, thereafter, acting upon said determination, did on or about the 1st day of July, 1921, appoint one H. E. Wadsworth as Special United States Allotting Agent at Large for all of the Mission Indian Reservations of California, and said Agent duly qualified as such and his said appointment thereupon became effective as of said above-mentioned date.

That acting under said appointment and pursuant to said above-mentioned Statutes and the Act of February 8, 1887 (24 Stat. L. 388), as amended

on June 25, 1910 (36 Stat. L. 855-865), said [26] Special Allotting Agent caused to be surveyed, platted and classified certain of the lands of the Palm Springs or Agua Caliente Reservation of Mission Indians of California in order that allotments thereof, in severalty, could be advantageously made by him to the members of said Band of Mission Indians in accordance with the said Statutes and in the manner provided by law.

IV.

That thereafter, to wit, on or about the 9th day of May, 1927, and pursuant to selections made for her by Lee Arenas, who was authorized and qualified to act, and was acting for and representing the plaintiff, the said Special Allotting Agent, acting pursuant to the instructions and directions given to him by the Secretary of the Interior and pursuant to Statutes of the United States therefor provided, did prepare and certify a schedule of allotments for and including each of the members of the Agua Caliente or Palm Springs Band of Mission Indians who had theretofore made, or for whom there had ben made, selections of lands for allotment, and did therein allot to the plaintiff the following described lands on said Reservation, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East S.B.M., comprising forty (40) acres, totaling 47 acres, as shown by said Special Allotting Agent's Schedule.

That the area so allotted to plaintiff, as shown by the Special Allotting Agent's Schedule of May 9, 1927, comprised forty-seven (47) acres of land formerly a part of the Palm Springs Mission Indian Reservation in Riverside County, California; that thereafter [27] said Special Allotting Agent issued and delivered to plaintiff a document entitled, "Selection for Allotment" in words and figures as follows, to wit:

"Selection for Allotment

"On Agua Caliente Indian Reservation, 1927

"This is to certify that Eleuteria Brown Arenas has selected the Lot 50, Sec. 14, Tract No. 41, Sec. 26, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 26, all in Township 4 South, Range 4 East of the San. Ber. M., containing 47 acres, more or less, according to Government Survey Stake No.....

"Not valid unless approved by the Secretary of the Interior.

"6-1060

/s/ "H. E. Wadsworth,

"U. S. Special Allotting
Agent."

That plaintiff accepted said Certificate of Selection for Allotment, and the lands described therein as and for her allotment.

V.

That the said Schedule of May 9, 1927, was duly forwarded by said Special Allotting Agent to the Commissioner of Indian Affairs in the office of the Secretary of the Department of the Interior at Washington, D. C. That the Commissioner of the General Land Office approved the said schedule insofar as it was applicable to the plaintiff herein, and thereafter the Commissioner of Indian Affairs duly forwarded said schedule to the Secretary of the Interior for his consideration and approval; that the Secretary of the Interior did not formally act thereon or approve or disapprove said schedule until on or about the 14th day of December, 1944, when the Secretary of the Interior purportedly disapproved said schedule of May 9, 1927, in toto. [28]

VI.

That the plaintiff complied with all requirements of the Act of January 12, 1891 (26 Stat. L. 712-714), as amended by the Act of March 2, 1917 (39 Stat. L. 976), and the Act of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 855), necessary to complete an allotment to her under the Schedule of May 9, 1927.

VII.

That the trust period under which said allotment is *how* held by the plaintiff pursuant to the provi-

sions of said Act of January 12, 1891 (26 Stat. L. 712), began to run on the 9th day of May, 1927, and will expire under the terms of said statute on the 9th day of May, 1952.

VIII.

That the plaintiff in this action is a restricted Indian and, although competent to contract for the payment of Court costs, attorneys' fees and expenses of litigation, cannot encumber or burden the lands allotted to her without the approval of the Commissioner of Indian Affairs and the Secretary of the Interior; that therefore this is a proper cause within which to retain jurisdiction for the purpose of allowing attorneys' fees and fixing the amount thereof, and costs and expenses of suit, and for providing security therefor, and for the payment thereof, and for disposing of any issues and matters in connection therewith.

From the foregoing facts the Court concludes:

Conclusions of Law

I.

That plaintiff is entitled to judgment against the defendant, the United States of America, as follows:

That on the 9th day of May, 1927, the United States of America duly allotted in severalty to Eleuteria Brown Arenas, the plaintiff herein, certain lands situated within the Palm Springs [29] or Agua Caliente Mission Indian Reservation in

Riverside County, State of California, as follows, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East S.B.M., comprising (40) acres, totaling 47 acres, as shown by said Special Allotting Agent's Schedule.

II.

That the plaintiff was, on the 9th day of May, 1927, a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, and as such was duly qualified in every way to receive said allotment; that said plaintiff duly performed all conditions on her part to be kept and performed under the law to entitle her to said allotment.

III.

That plaintiff's right to said allotment arose on the 9th day of May, 1927, and on said date she became and ever since has been and now is the equitable owner of said allotment and, as such owner, is entitled to a trust patent from the United States of America to the lands included in said allotment pursuant to Section 5 of the Act of January 12, 1891 (26 Stat. L. 712).

IV.

That the trust period provided for in the Act of January 12, 1891 (26 Stat. L. 712), under which said allotment was made and is now held by the plaintiff, began to run on the 9th day of May, 1927, and will expire under the terms of said statute on the 9th day of May, 1952. [30]

V.

That the several attorneys for the plaintiff have incurred expenses and have performed valuable services for the plaintiff in this action; that said attorneys are entitled to a reasonable and proper allowance for their fees for services rendered to the plaintiff and for expenses of suit in this action; that this is a proper cause for the Court to retain jurisdiction of the parties and subject-matter thereof for the purpose of determining the value of such services and the amount of such expenses and for the payment, security, and discharge thereof and for the making and enforcing of such orders in connection therewith as this Court may deem just and proper.

Let judgment be entered accordingly for the plaintiff.

Dated this 21st day of May, 1948.

/s/ CHARLES C. CAVANAH,
Judge.

Approved as to Form:

JAMES M. CARTER,
United States Attorney;

IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant.

[Endorsed]: Filed June 23, 1948. [31]

In the United States Court of Appeals
for the Ninth Circuit

No. 12,218

UNITED STATES OF AMERICA and ELEU-
TERIA BROWN ARENAS, Also Known as
Della Nicholson,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

Appeal from the District Court of the United States
for the Southern District of California,
Central Division

March 23, 1950

Before: Stephens and Pope, Circuit Judges, and
Ling, District Judge

Stephens, Circuit Judge

OPINION

This case, both as to fact and as to law, practically parallels the companion case No. 12,046 this day decided¹ which concerns attorneys' fees and expenses owing by Lee Arenas. We fully treated the fundamental issues of this case in the companion case.

¹No. 12,046, Lee Arenas v. John W. Preston, Oliver O. Clark and David D. Sallee; United States of America and Lee Arenas v. John W. Preston, Oliver O. Clark, and David D. Sallee.

The district judge in the instant case fixed attorney fees on a percentum value basis of the allotted land unrestricted by any interest of the United States and made an allowance for expenses. He ordered the land impressed with a lien to secure payment of the attorneys' fees and expenses and ordered the land sold forthwith by a commissioner in discharge of the indebtedness. The lien was ordered impressed and the attorney fee was fixed upon the theory that the allotment was entirely free from any interest of the United States. A mere reading of our opinion in the companion case will clearly show that such theory was wrong and substantially affected the court's conclusions and judgment and constituted reversible error.

The record shows on its face that whereas \$100 was allowed as expenses, only \$15 was actually expended. The judgment should be reduced in accordance with these facts.

The case is remanded to the district court with instructions to proceed to fix an attorney fee and to secure its payment by the impressment of a lien on the allotted property all in accord with our expressions in the Lee Arenas case. Any lien impressed upon the property should be foreclosable only after a reasonable period has elapsed in which payment could be made.

Affirmed in part, reversed in part, and remanded.

[Endorsed]: Opinion. Filed Mar. 23, 1950. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12,218

UNITED STATES OF AMERICA, et al.,
Appellants,
vs.
JOHN W. PRESTON, et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court
for the Southern District of California, Central
Division.

This Cause came on to be heard on the Tran-
script of the Record from the United States District
Court for the Southern District of California, Cen-
tral Division, and was duly submitted.

On Consideration Whereof, It is now here ordered
and adjudged by this Court, that that part of the
judgment of the said District Court in this Cause
which allows appellees the sum of \$100.00 for
costs and expenses be, and hereby is reduced to the
sum of \$15.00 and that this cause be, and hereby
is remanded to the said District Court with in-
structions to determine the sum of money for which
amount the lien against the allotted property is
to be impressed. Upon such determination having
been made and upon the lien having been accord-
ingly impressed upon the property the judgment
shall stand affirmed, except as to proper assignments
of error which may be claimed to have occurred
in the determination herein ordered. The District

Court should retain jurisdiction to do all things necessary in regard to the lien as it did in the judgment under review here, and any lien impressed upon the property should be foreclosable only after a reasonable period has elapsed in which payment could be made, each party to bear its own costs on appeal.

Filed and entered March 23, 1950.

PAUL P. O'BRIEN,
Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 6221

ELEUTERIA BROWN ARENAS, Also Known
as DELLA NICHOLSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

OPINION

Cavanah, District Judge:

The nature of the problem now presented to the court for determination is to comply with the opinion and decree of the Ninth Circuit Court of Appeals, 181 Fed. (2d) 62, 67, and the pertinent provisions upon remand, that the District Court

should proceed to fix the dollar value of the services performed by the attorneys for the plaintiff and the manner of how they are to be paid, by the impressment of a lien on the allotted property, as the appellate court said that, "The district court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien and in doing so should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indians' interest in the allotted land under the trust patent, as one of the elements to be taken into consideration, see *Sampsell v. Monnell*, 9 Cir., 1947, 164 Fed. (2d) 4. The case is remanded to the District Court with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed. . . . The case is remanded to the District Court with instructions to proceed to fix an attorney fee and to secure its payment by the impressment of a lien on the allotted property all in accord with our expressions in the *Arenas* case No. [103] 12,046."

The court realizes that the ultimate question here under the decision of the Court of Appeals is, what is the extent of the Indians' interest in the allotment involved under the Act of Congress which allows the Indians different interest in the Palm Springs Reservation. That ultimately has to be decided by the court in fixing the value of the attorney fees for the services they have rendered in this case. The plaintiff, an Indian allottee, has a

trust patent to an allotment in the reservation consisting of forty-seven acres under the Act of Congress which provides certain restrictions. Title 25 U.S.C.A., Secs. 348 and 391. The petitioners represented her in requiring the defendant United States to issue to her the trust patent, resulting in a decree in her favor in this court which was affirmed by the Ninth Circuit Court of Appeals, 181 Fed. (2d) 62, *supra*, with the instructions as above stated.

The Supreme Court in the *Arenas* case, 322 U. S. 419, has held that the Indians under the Act of Congress were entitled to an allotment of lands in severalty and a trust patent thereto in the reservation; and therefore, the nature of the title of the plaintiff is one held in trust by the United States under the restrictions, while her title in reality is a fee simple title, and the restrictions placed upon alienation during the trust period do not debase her right below a fee simple. It is a vested interest under the Act of Congress. *United States v. Paine Lumber Co.*, 206 U. S. 467; *Libby v. Clark*, 118 U. S. 250; *United States v. Minnesota*, 113 Fed. (2d) 770; *Eastman v. United States*, 28 Fed. (2d) 807. Under the 5th Amendment of the Constitution, the estate of an Indian allottee under a trust patent is one in fee simple and in which his right is vested. *Morrow v. United States* (9th Cir.), 243 Fed. 854; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Choate v. Trapp*, 224 U. S. 665. [104]

Having then expressed the thought that the In-

dian allottee has a fee simple title to the allotment, subject only to the restrictions enumerated in the patent trust act, the market value of the fee title is the guide to what the value is to the Indian.

In ascertaining the market value of a given tract of land, you may consider its location, surroundings, and purposes for which it is adapted. It does not sanction a remote or speculative value. The plaintiff will be entitled to a fee patent in May, 1952. There appear considerable conflicting testimony between the parties as to what is the market value of the allotment secured by the present action. The facts considered by the parties when in fixing the fee value of the three tracts here involved vary considerably as to the market value of the forty-acre tract. Considering then the value of the three tracts of land involved separately, the court reaches the conclusion as follows: Two-acre-tract: \$20,000 per acre of a total of \$40,000. The five-acre-tract: \$66,000, as those two tracts are situated near business property and Indian Avenue, making a total value of those two tracts to be \$106,000. As to the value of the forty-acre tract which is situated one-half mile from Ramson road or business property, is \$60,000, and is removed from any accessibility, and a road must be built and has to be developed and it lies in the center of a wash-area, making a total reasonable value of the three tracts to be \$166,000 as the plaintiff's interest in the allotment under the trust patent and is one of the elements to be considered and deter-

mined under the decision and mandate of the Court of Appeals in the present case.

It will be remembered from a reading of the record that there appears extreme views given by expert witnesses for plaintiff and respondent, and the court is forced to consider also other facts and circumstances. Counsel for respondent asserted at the oral argument that the attorneys should be paid a reasonable and substantial fee. The final inquiry then is that the attorneys' fees involved should be measured by the market value of plaintiff's estate in fee, [105] in determining the value of petitioners' legal services to the plaintiff and they are those rendered to the plaintiff in the present case. It appears that the petitioners rendered legal services in the Arenas case in obtaining the final decision of the Supreme Court that the Indians under the Trust Patent Act were entitled to a trust patent to the allotments included in the Supreme Court's decision, which related to the Palm Springs Band of the Mission Indians, and should pay their proportion of the attorneys' fees as the result of that decision, added to the interest and value of each allotment and the reasonable amount thereof in this case would be an attorney fee of \$5,000.00.

The conclusion is thus reached that, as the value of the plaintiff's estate is \$166,000, a reasonable attorney's fee for the legal services rendered by the petitioners is \$20,750.00, plus \$5,000.00 for the services rendered in the Arenas case, making a total attorney's fee of \$25,750.00, to be paid to the petitioners as attorneys' fees, with a lien upon plain-

tiff's allotted land to secure the payment thereof, and the item of \$15.00 as costs allowed by the Court of Appeals in the previous hearing. The plaintiff is given six months within which to pay the judgment, and if not paid within such time the allotment be sold as provided by the Federal Rules and Statutes to satisfy the payment; and the court reserves jurisdiction over the cause and parties until the payment is fully satisfied.

The motions of the respondents to strike the opinions of the witnesses, Beckley and Gallagher, and other witnesses, as to values are denied. Counsel for petitioners to prepare and present findings and decree.

[Endorsed]: Filed Jan. 29, 1951. [106]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee heretofore regularly filed their petition in the above-entitled cause praying that the court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for

the payment thereof and the manner of such payment and the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition came on regularly for hearing, after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled court, Honorable Charles C. Cavanah, a Judge thereof, presiding, in the courtroom of said court in the United States Post Office Building at the northeast corner of [107] Temple and North Spring Streets, in the City of Los Angeles, State of California, on the 27th day of November, 1950;

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice, and the plaintiff herein appeared personally and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their official capacities;

Whereupon, in accordance with the decisions of the United States Court of Appeals for the Ninth Circuit, reported in *Arenas v. Preston, et al.*, 181 F. 2d 62, and *United States v. Preston, et al.*, 181 F. 2d 69, and the mandates issued pursuant to the judgments of said court in said causes, evidence, both oral and documentary, was offered and received, and the cause was submitted to the court for decision upon argument and briefs of respective counsel; and the court being fully advised in the premises, the following findings of fact and con-

clusions of law constituting the decision of the court in said proceeding for a supplemental decree, as aforesaid, are hereby made, to wit:

Findings of Fact

I.

That on or about the 20th day of November, 1940, the plaintiff, Eleuteria Brown Arenas, also known as Della Nicholson, orally employed petitioners Oliver O. Clark and David D. Sallee, and on or about the 9th day of December, 1944, said plaintiff in writing employed petitioners John W. Preston, Oliver O. Clark and David D. Sallee, to represent her as her attorneys in all matters respecting an allotment of lands in severalty to her in the Palm Springs Reservation of Mission Indians, County of Riverside, State of California, and agreed thereby to compensate petitioners for their services on a quantum meruit basis and to reimburse them for expenses of suit [108] in her behalf.

II.

That said petitioners, prior to the filing of their petition herein, fully performed and completed the duties of their said employment.

III.

That each of the allegations contained in Paragraphs I, II, III, IV, V, VI and XIII of the petition for supplemental decree herein is true.

IV.

That petitioners have not been paid, nor have

they received any sum whatsoever for the services rendered by them in this action. That petitioners have advanced for necessary expenses in prosecuting this action the sum of Fifteen Dollars (\$15.00), no part of which has been paid or refunded to them. That all of said compensation and expenses are due and unpaid.

V.

That the lands described in Paragraph IV of said petition for supplemental decree herein lie within or near the City of Palm Springs, County of Riverside, State of California, and are subject to restrictions against alienation during the trust period which, unless said period can legally be extended by Presidential order, will expire on or about the 9th day of May, 1952.

VI.

That the reasonable value of plaintiff's interest and estate in the allotted lands, under the trust patent decreed to the plaintiff by this court, is as follows:

Value of Lands Allotted to Plaintiff

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising 2 acres.....	\$ 40,000.00
Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres	\$ 66,000.00

Parcel (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of
 Section 26, Township 4 South, Range 4
 East, S.B.M., comprising forty (40)
 acres\$ 60,000.00

Total value of said Parcels....\$166,000.00

VII.

That the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above-entitled cause for which said petitioners are entitled to receive as compensation the sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750.00), said amount being the reasonable value of said legal services. That no part of said amount has been paid to the petitioners, and all of said sum is due and unpaid.

VII.

That it is reasonable and equitable that until the compensation and expenses of suit due to the petitioners from the plaintiff, as described and set forth in Paragraphs IV and VII of these Findings, are fully paid that the petitioners be secured by an equitable lien upon the whole of the lands allotted to the plaintiff, said lands being fully described in Paragraph VI of these Findings.

VIII.

That it is reasonable and equitable that the plaintiff be allowed a period of six (6) months from the

date of the entry of the supplementary decree in this cause within which to pay the compensation and expenses of suit herein found to be due to the petitioners.

IX.

That it is reasonable and equitable that if the plaintiff [110] shall fail to pay the amounts to be found to be due and unpaid to said petitioners, the lands described in Paragraph VI hereof, or so much of said lands as may be necessary, shall be sold to pay and satisfy the compensation and expenses of suit due from said plaintiff to said petitioners.

X.

The value of the services rendered by petitioners in the Lee Arenas case for the benefit of respondent-plaintiff was \$5,000, and the value of the petitioner's services rendered in the present case was \$20,750.00.

Attendance in court by petitioners were in excess of five days.

From the foregoing facts, the Court concludes:

Conclusions of Law

I.

That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee, are entitled to receive as compensation for their services to the plaintiff in the above-entitled action the sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750.00), and the petitioners are also entitled to reimbursement from the plaintiff the sum of Fifteen

Dollars (\$15.00), advanced by said petitioners as costs and expenses of suit, and to judgment and decree for said compensation, costs and expenses.

II.

That the petitioners are entitled to an immediate equitable lien upon the lands allotted to plaintiff, said lands being fully described in Paragraph VI of the foregoing Findings of Fact, herein, to secure the payment of the compensation, costs and expenses of suit as described and set forth in Paragraph I of these Conclusions; and upon the entire interest of plaintiff and her heirs in said lands, if any, in the hands of the United States of America, until said compensation, costs and expenses shall be fully paid and satisfied.

III.

That the court should retain jurisdiction over this action and the parties thereto and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, a judicial sale of plaintiff's lands shall be made [111] and the proceeds thereof distributed as set forth in Paragraph I of these Conclusions, and in order to require and compel the enforcement, or the satisfaction and discharge, of the equitable lien awarded to the petitioners; and for the purpose of appointing a commissioner to make said sale and to distribute the proceeds thereof; and, generally, for the purpose of effectuating and enforcing fully the judgment and decree herein, in

accordance with the equitable jurisdiction, practice and procedure of this court.

IV.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Dated this 28th day of February, 1951.

Allowed Feb. 28, 1951.

/s/ CHARLES C. CAVANAH,
Judge.

Approved as to form:

/s/ ERNEST A. TOLIN,
United States Attorney.

/s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,
Attorneys for the Defendant.

[Endorsed]: Filed Mar. 2, 1951. [112]

United States District Court, Southern District
of California, Central Division

No. 622-PH Civil

ELEUTERIA BROWN ARENAS, Also Known as
DELLA NICHOLSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AND
SUPPLEMENTAL DECREE

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly filed their petition in the above-entitled cause praying that the Court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for the payment thereof and the manner of such payment and the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled Court, Honorable Charles C. Cavanah, a Judge thereof, presiding in the Courtroom of said Court

in the United States Post Office Building at the Northeast corner of Temple and Spring [113] Streets, in the City of Los Angeles, County of Los Angeles, State of California, on the 27th day of November, 1950.

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice, and the plaintiff herein appeared personally and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their said official capacities;

Whereupon, evidence, both oral and documentary, was offered and received, and the cause was submitted to the Court for decision upon briefs of respective counsel; and the Court having made and filed its findings of fact and conclusions of law and having ordered that judgment be entered in accordance therewith;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee, have and recover from the plaintiff, Eleuteria Brown Arenas, also known as Della Nicholson, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in the above-entitled action the sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750.00), which includes said sum of \$5,000 referred to in the Findings of Fact.

Second: That the petitioners have and recover from the plaintiff the further sum of Fifteen Dollars (\$15.00), heretofore paid by the petitioners for the use and benefit of the plaintiff in the above-entitled action.

Third: That the payment of the compensation awarded hereby to the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee, and the payment of said sum of Fifteen Dollars (\$15.00), heretofore paid by said petitioners for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the lands allotted to said plaintiff under [114] the allotment proceedings of 1927, and upon all rights conferred upon said plaintiff by said allotment proceedings, and upon the entire interest and estate of said plaintiff and her heirs in said lands, and upon the entire interest, if any, in said lands in the hands of the United States of America; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, and until said sum of Fifteen Dollars (\$15.00), paid by said petitioners for the use and benefit of said plaintiff, shall be fully paid and satisfied. The lands allotted to said plaintiff, upon which said equitable lien is impressed by this judgment and supplemental decree, are situated in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, County of Riverside, State of California, and are more particularly described as follows, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres,

said three tracts totaling forty-seven (47) acres, as shown by the Special Allotting Agent's Schedule of May 9, 1927.

Fourth: That the plaintiff, Eleuteria Brown Arenas, also known as Della Nicholson, be and she is hereby allowed a period of six (6) months from and after the date of the entry of judgment and supplemental decree herein within which to pay the compensation and expenses of suit awarded to the petitioners, as described and set forth in Paragraphs First and Second hereof.

Fifth: That if the said plaintiff shall fail to pay and [115] fully satisfy the compensation and expenses of suit awarded to said petitioners, as described and set forth in Paragraphs First and Second hereof, within six (6) months from the date of the entry of judgment and supplemental decree herein, then and in that event the lands allotted to said plaintiff, as described in Paragraph Third hereof, shall be sold pursuant to the further orders and direction of the Court and in the manner and form provided by the federal statutes, and the proceeds of such sale, or sales, shall be distributed

as follows, to wit: (1) to pay the costs and expenses of sale, including fees of a commissioner to make such sale; (2) to the payment of the compensation and expenses of suit awarded hereby to said petitioners; and (3) the balance shall be paid to the United States of America in trust for the plaintiff.

Sixth: The Court hereby retains jurisdiction over this action and the parties thereto and the subject matter thereof, in order to act upon and determine the time, or times, when and the manner in which, and the method, or methods, whereby said allotted lands shall be sold and the payment of the compensation and expenses of suit hereby awarded to said petitioners shall be made to them, and in order to require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded to the petitioners, and in order to make and confirm a sale of said lands of the plaintiff, and to make distribution of the proceeds of said sale to the parties thereto as hereinabove provided, and in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction practice and procedure of this Court.

Seventh: That the parties to this proceeding pay their own [116] costs, respectively, incurred herein.

Dated this 28th day of February, 1951.

Allowed Feb. 28, 1951.

/s/ CHARLES C. CAVANAH,
U. S. District Judge.

Approved as to form:

/s/ ERNEST A. TOLIN,
United States Attorney.

/s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,
Attorneys for the Defendant.

Judgment entered March 2, 1951.

[Endorsed]: Filed March 2, 1951. [117]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, and Eleuteria Brown Arenas, also known as Della Nicholson, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment and Supplemental Decree made and entered herein on March 2, 1951, in Judgment Book 71, at page 254, in favor of John W. Preston, Oliver O. Clark, and David D. Saltee, petitioners, and against Eleuteria Brown Arenas, also known as Della Nicholson, plaintiff and respondent, and the

United States of America, defendant and respondent, and from the whole thereof.

Dated May 1, 1951.

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Appellants.

[Endorsed]: Filed May 1, 1951. [118]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The United States of America and Eleuteria Brown Arenas, also known as Della Nicholson, appellants in the above-entitled cause, submit the following statement of points which will be relied upon on appeal:

1. The Court erred in assuming jurisdiction to determine the petition for attorneys' fees and moneys advanced as expenses of suit in this proceeding;

2. The Court erred in finding, concluding and adjudging that petitioners were entitled to an equitable lien upon the trust patent allotments to secure the payment of attorneys' fees and moneys

advanced as expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien;

3. The Court erred in finding, concluding and adjudging that the lands involved should be sold at public [120] auction to satisfy the lien in the event that the judgment for fees and expenses was not paid, and in failing to find and conclude that it was without jurisdiction so to do;

4. The Court erred in awarding to petitioners an additional \$5,000 for services rendered in the Lee Arenas litigation (No. 1321-O'C Civil);

5. The Court erred in finding (Finding No. I) that Eleuteria Arenas had on or about November 20, 1940, orally employed petitioners Clark and Sallee as her attorneys;

6. The amount of the fees awarded to petitioners is excessive and not supported by competent evidence;

7. The Court erred in basing the award of compensation upon the market value of the full fee title to the lands involved rather than upon the market value of the Indian's interest therein;

8. The values found for the various parcels of the restricted allotment are excessive and not supported by competent evidence;

9. The Court erred in valuing the various parcels as of the date of the judgment in the allotment proceedings in 1948 rather than as of the date of the hearing on attorneys' fees.

10. The Court erred in denying the motion to strike the opinions of value given by petitioners' witnesses Beckley and Gallagher for the reason that such opinions were based upon improper considerations.

Dated May 22, 1951.

ERNEST A. TOLIN,
United States Attorney,
IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1951. [121]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States of America and Eleuteria Brown Arenas, also known as Della Nicholson, appellants in the above-entitled cause, designate the following for inclusion in the record on appeal:

1. Complete list of Clerk's docket entries to and including entry of September 8, 1948;
2. Complaint for trust patent, filed January 9, 1947;
3. Answer, filed November 25, 1947;

4. Stipulation and order for admission of evidence, including Exhibits A and B, attached thereto;
5. Opinion, filed May 20, 1948;
6. Findings of Fact and Conclusions of Law, filed June 23, 1948;
7. Petition for supplemental decree for attorneys' fees, etc., filed September 29, 1948; [123]
8. Order to Show Cause, filed September 29, 1948;
9. Special Appearance of and Motion to Dismiss by the United States, filed October 28, 1948;
10. Affidavit of Irl D. Brett, filed October 28, 1948;
11. Answer of respondent Eleuteria Brown Arenas, filed October 28, 1948;
12. Answer of United States, lodged October 28, 1948;
13. Reporter's transcript of the proceedings of October 29, 1948;
14. Petitioners' Exhibits Nos. 1 to 7, inclusive;
15. Opinion, filed January 3, 1949;
16. Findings of Fact and Conclusions of Law, filed February 4, 1949;
17. Judgment and Supplemental Decree, filed February 4, 1949;
18. Notice of Appeal, filed February 14, 1949;
19. Minute Order of March 16, 1949;
20. Statement of Points on Appeal, filed April 4, 1949;
21. Opinion of United States Court of Appeals for the Ninth Circuit in C. A. No. 12218, filed March 23, 1950;

22. Judgment of United States Court of Appeals for the Ninth Circuit in C. A. No. 12218, filed March 23, 1950;

23. Reporter's Transcript of trial proceedings on November 27, 28 and 29, 1950;

24. Petitioners' Exhibit Nos. 8, 9 and 10; and Respondents' Exhibits A to U, inclusive;

25. Opinion, filed January 29, 1951;

26. Findings of Fact and Conclusions of Law, filed March 2, 1951;

27. Judgment and Supplemental Decree, filed March 2, 1951;

28. Notice of Appeal, filed May 1, 1951;

29. Statement of Points on Appeal;

30. This Designation of Record. [124]

Dated May 22, 1951.

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant,
United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1951. [125]

In the United States District Court, Southern
District of California, Central Division

No. 6221-PH Civil

ELEUTERIA BROWN ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Charles C. Cavanah, Judge, Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Petitioners:

JOHN W. PRESTON, ESQ.,
712 Rowan Building,
Los Angeles, California.

For Defendant and Respondent United States
of America, and Respondent Eleuteria
Brown Arenas:

IRL D. BRETT, ESQ.,
Special Assistant to the Attorney
General.

November 27, 1950, 10:00 A.M.

The Clerk: Eleuteria Brown Arenas vs. United
States of America, No. 6221-PH.

The Court: You may proceed whenever you are ready.

Mr. Preston: Your Honor, we are ready for the petitioners.

Mr. Brett: The plaintiff and respondent Eleuteria Brown Arenas, also known as Della Nicholson, represented by the United States Attorney, and the United States of America, defendant, are ready, with this one observation. At a stage of the proceedings this morning I desire to recall a valuation witness offered by the petitioners——

Mr. Preston: You want to wait until we get our case in first, don't you?

Mr. Brett: Yes. In connection therewith, I wanted to use a deposition I took in Palm Springs on the 9th of this month. It has just been handed to me, and I would like about a five-minute recess when we are about to reach that.

The Court: Very well.

Mr. Preston: May it please the court, we are here today following a mandate of the Circuit Court of Appeals for the purpose of fixing the attorneys' fees for the petitioners in this case in dollar value as distinguished from a percentage interest in the property involved. A study of that [2*] opinion of the Circuit Court of Appeals and the mandate thereon convinces me that we are here for the purpose of fixing attorneys' fees founded upon several factors. Those factors are enumerated in various decisions of the state court, and also by the federal decisions. I have a memorandum that I prepared on the law of this case, certain branches of the law,

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

that I anticipated might come up, and I will pass it up, if the court would like to have it.

The Court: Very well.

Mr. Preston: And I will give Mr. Brett a copy.

Mr. Brett: Thank you.

Mr. Preston: Now, as I view that decision of the Circuit Court of Appeals, the percentage fixed by this court is no longer necessarily applicable. The question of fixing the fees is set at large, it is true, and the decision in all other respects affirmed, but that necessarily, in my judgment, sets at large the question of percentage.

I don't know whether the court has had any chance to study this record or give any thought to this subject since the trial before, but I take it what we are interested in here is the fixation of these fees on the various factors that enter into the subject, one of which is the value of the property under the trust patent, whether that is the value to the Indian or the market value, or the nature of the Indian's interest in it, or all questions that may have [3] to be considered by this court. When the time comes to argue those questions, I want to be heard and, of course, I know the government desires also to be heard.

The length of this hearing and the breadth of this hearing will largely depend upon the court's view of what the nature of the Indian's title is to his allotment.

I want to supplement the brief that I handed you with a quotation from *Choate vs. Trapp*, 224 U. S. at 665, which deals with the nature of the property

of an Indian in his allotment. It holds that it is a vested interest protected by the Fifth Amendment. In the footnote of the Circuit Court of Appeals decision, there are numerous cases quoted by the writer of the opinion to portray and to declare the nature of the Indian's title in an allotment.

I don't want to make an argument at this time, but I do want to have it understood that probably sooner or later during the hearing we will have to enter into an argument as to just what the court is going to value in this case.

In order to start the hearing, I ask that the record show that the reporter's transcript heretofore taken in this proceeding, the exhibits introduced in evidence at that hearing, including the depositions of Oliver Clark, David D. Sallee, and John W. Preston, be all considered as a portion of the hearing in this case. I understand there is no objection to that. [4]

In order to facilitate the court's consideration of these items I have just enumerated, I desire to offer in evidence as our Exhibit 1 on this hearing, I take it a transcript on appeal, which contains everything that I have referred to in these other three items, and probably some other things, and in order to facilitate the hearing, I would like to have the court accept one of these printed transcripts in order to be advised at all times of what is in these documents that are before you.

The Court: Would that conflict with the exhibit numbers at the original hearing?

Mr. Preston: It might. I don't know.

The Clerk: You have 1 to 7 at the original hearing.

Mr. Preston: Better have that Exhibit 8 then.

The Court: Do you recall any others?

Mr. Preston: I don't know of any others. This will be Exhibit 8 of this hearing, then, following consecutively after the exhibits at the previous hearing.

Mr. Brett: Your Honor, I didn't want to be discourteous and interrupt the judge. I have no objection to the offer of the transcript of the record on appeal, which is now offered as Exhibit 8, subject to this requested condition, that it is offered on a new matter and that I be permitted to further cross-examine any of those witnesses as it may appear to be necessary to do so. [5]

I understand, and I believe it is correct, that the last statements of Judge Preston have properly disclosed that the two items previously referred to, to wit, the reporter's transcript of the evidence, the exhibits, and the depositions of the three petitioners, are incorporated in this one printed document, which has now been offered as Petitioner's Exhibit 8.

The Court: Very well.

The Clerk: That will be marked Petitioner's Exhibit 8.

(The document referred to was received in evidence and marked Petitioner's Exhibit 8.)

Mr. Preston: Your Honor, I have brought here today a distinguished member of the bar that I

would like to have testify, with the court's consent, as an expert witness on the valuation of attorneys' fees based upon the record that has been introduced in evidence and upon a hypothetical question I have prepared to propound to him.

The Court: You may do so.

Mr. Preston: Mr. Martineau, will you take the stand? [6]

L. R. MARTINEAU, JR.

called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: L. R. Martineau, Jr.

Mr. Preston: Would the court like a copy of the proposed question?

The Court: No. You can go ahead. I will follow you.

Mr. Preston: I imagine, as an experienced trial judge, you will take everything that is deemed to be at all pertinent, and then consider it or throw it out afterward.

Direct Examination

By Mr. Preston:

Q. Mr. Martineau, where is your residence?

A. Los Angeles, California.

Q. What is your avocation or vocation or calling or profession?

A. I am an attorney at law.

(Testimony of L. R. Martineau, Jr.)

Q. Did you take a law degree before admission to the bar? A. I did. [7]

Q. Where did you take you degree?

A. I had my college A.B. at Harvard, and my law degree, LL.B., at Harvard Law School.

Q. What year? A. In 1912.

Q. You got cum laude in one of your degrees, too, I see. A. That is right.

Q. And you were admitted to practice first in what state?

A. To the bar of the Supreme Court of Utah.

Q. What year? A. August 16, 1912.

Q. Are you admitted to the bar of any other state besides California?

A. Yes. I was admitted to the Circuit Court of Appeals of the Northern District of California in 1913. I was admitted to the Supreme Court of the State of Idaho by special order of court on 1918. I was admitted to the Supreme Court of the State of California in 1927. I am a member of the Bar of the Supreme Court of the United States and of other federal courts.

Q. Recite your further memberships. Are you a member of the State Bar of California?

A. I am.

Q. And when did you become a resident of California? [8] A. In April, 1927.

Q. Tell us what has been the general nature, if you can describe it, of your practice at the bar.

A. My practice has been in general related to fields of corporation law and finance, administrative

(Testimony of L. R. Martineau, Jr.)

law, and trial work in state and federal courts in contested matters, including certain specific work for the United States of America as a special assistant to the Attorney General of the United States.

Q. Were you ever associated with a man now known as Judge Harold M. Stephens?

A. I was.

Q. He is now Chief Judge of the Court of Appeals of the District of Columbia, is he not?

A. That is true. Harold M. Stephens, Chief Judge of the Court of Appeals of the District of Columbia, is a former partner of mine.

Q. Have you testified in proceedings similar to this before? A. Yes.

Q. On about how many different occasions, to your knowledge?

A. I hadn't thought of being asked that question. It might be somewhat hard to recall, but I would say more than a half dozen and maybe as many as a dozen. [9]

Q. Did you testify as an expert witness in the evaluation of witness fees in the Lee Arenas case?

A. I did. May I ask, Judge Preston, whether you, in your former question antecedent to this one, were referring to times when I had been sworn as a witness?

Q. Witness in the matter of attorneys' fees.

A. You are not referring to the times I have been consulted in other capacities in that connection?

Q. No. Only the times you have testified as an

(Testimony of L. R. Martineau, Jr.)

attorney in the matter of fixation of fees. What is your answer now?

A. May the question be read?

Q. I will reframe it. About how often have you been called in actions where you were interrogated as to your opinion as to the value of attorneys' fees?

A. Well, not too frequently, Judge Preston, because most of those matters do not come for judicial attention, but I would say, over the course of the years, I have been sworn and have testified in somewhere between a half dozen and a dozen cases.

Q. I asked you previously whether you testified in this court in Action No. 1321, known as the case of Lee Arenas v. the United States.

A. I did.

Q. And in that case you examined the transcript, did [10] you not?

A. I examined a great deal more than the transcript, but included in the work that I did, I examined the transcript.

Q. The transcript and the briefs, and what else did you examine in that case?

A. I examined what you denominated in your question as the record in that case, but that also involved not what a clerk of the United States Court would call a record that he certified, but what you called a record. In addition to that, the law of the cases which had to be reversed, and other judicial opinions which affected the outcome in the Lee Arenas case.

(Testimony of L. R. Martineau, Jr.)

Q. You have at my request made a study of certain records in this case, have you not?

A. I have.

Q. What have you examined in this case?

A. I have examined what you have offered, I believe, as Exhibit 8 in this hearing this morning. If I may see it for a moment, I will check that answer by the number of the transcript, which is 12,218, in the United States Court of Appeals.

Q. I furnished you also another transcript, did I not?

A. You did. You furnished me a copy of Transcript No. 12,046 in the United States Court of Appeals, entitled "Lee Arenas v. John W. Preston, et al.," and a transcript of a [11] record which appears to have been received by you in 1949.

May I complete my answer, Judge?

Q. Yes, go ahead.

A. In addition to that, I examined the depositions of Oliver O. Clark, David D. Sallee, and John W. Preston, each of whom is a member of the bar, I believe, in Case No. 6221-PH Civil, and the reporter's transcript of certain proceedings had in the Eleuteria Brown Arenas case against the United States, denominated in the United States District Court for the Southern District of California No. 6221-PH Civil, which occurred commencing on March 23, 1948.

Q. Mr. Martineau, I would like to propound to you a hypothetical question. I am going to read it to you. Have you a copy before you?

(Testimony of L. R. Martineau, Jr.)

A. I have a copy here, sir.

Q. Please assume the existence of the following facts as the basis of your opinion of the value of legal services rendered by three attorneys, namely, John W. Preston, Oliver O. Clark, and David D. Sallee, for and at the request of the plaintiff in this cause, Eleuteria Brown Arenas, in securing for her an allotment of lands in severalty on the Palm Springs Indian Reservation in Riverside County, California, and a judicial adjudication of her right to a trust patent thereto;

Assume: that when plaintiff was about two or three years of age she was taken into the home and was thereafter treated [12] as a member of the family of Lee Arenas and his wife Guadaloupe Arenas, both of whom were of Indian blood and descent and duly enrolled members of the Palm Springs Band of Mission Indians; that thereafter Lee Arenas and Guadaloupe Arenas reared, supported, and educated plaintiff until she was fourteen or more years of age; that while a member of said family plaintiff was adopted into and became a duly enrolled member of said Band of Indians, and at all times since has been, and now is, a duly enrolled member of said Band; that some time prior to the 9th day of May, 1927, Lee Arenas, acting for the plaintiff in loco parentis, requested in writing of H. W. Wadsworth, who was then the duly appointed, qualified and acting Allotting Agent of the United States of America for all of the Bands of the Mission Indians of California, in-

(Testimony of L. R. Martineau, Jr.)

cluding the Palm Springs Band, that plaintiff be allotted in severalty certain lands on the Palm Springs Reservation described as follows, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres; that the lands so selected for the plaintiff were included in a Schedule of Allotments prepared and transmitted by said [13] Allotting Agent to the Secretary of the Interior on or about May 9, 1927; that thereafter the Secretary failed and refused to approve or disapprove said selection, or any other selections for allotment made by or for the members of said Band of Indians, and failed and refused to issue trust patents to any of the members of said Band covering the lands selected for allotment by them.

Assume that in the year 1940 Lee Arenas, acting for himself and also for the members of his family, including the plaintiff, employed Messrs. Sallee and Clark to file and prosecute a test case against the United States of America to determine the right of said persons to allotments in severalty and trust patents to the lands selected by them, and each of them, on or prior to May 9, 1927, in accordance with

(Testimony of L. R. Martineau, Jr.)

and as shown by the Schedule of Allotments prepared and transmitted by said Alloting Agent to the Secretary of the Interior; and that thereafter a test case was prepared and filed by said attorneys in the name of Lee Arenas against the United States on the 24th day of December, 1940, in the United States District Court for the Southern District of California, Central Division, being No. 1321-O'C Civil in said court.

Assume: that after the decision of the Supreme Court of the United States in *Lee Arenas v. United States of America*, 322 U. S. 419, 64 S. Ct. 1090, holding, in effect, that Lee Arenas was entitled to an allotment of lands in severalty and [14] a trust patent thereto, the attorneys mentioned filed an action on behalf of the plaintiff Eleuteria Brown Arenas against the United States to determine her right to an allotment of and trust patent to the lands heretofore described and prosecuted said action to judgment in the United States District Court for the Southern District of California on the 18th day of May, 1948, to the effect that plaintiff was, on the 9th day of May, 1927, and is now, entitled to a trust patent to said lands.

Assume: that the following work was done by said attorneys, Preston, Clark, and Sallee, in the test case of *Lee Arenas v. United States of America*, being No. 1321-O'C Civil in this court, to wit:

Mr. Brett: Just minute. If the Court please, as to this particular assumption——

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: I better read it all and then you can make your objection.

Mr. Brett: It is now in reference to the work that these three petitioning attorneys did in connection with the Lee Arenas case, an entirely separate action. Does your Honor have before you Exhibit 8, which has just been received in evidence? Will you turn to page 47?

The Court: Is there any dispute as to that action?

Mr. Brett: If you will turn to page 47, which is a part of your Honor's opinion in this particular case——

Mr. Preston: Well, I think that—— [15]

Mr. Brett: May I be permitted to continue?

Mr. Preston: I would like to finish reading the question and then you can make your objection afterward.

Mr. Brett: The point is this. I understand it is always necessary, as well as proper, that an objection be made to any material included in a hypothetical question which the court has already ruled upon as not being proper matter.

Mr. Preston: The court has not ruled on this at all. It is true you indicated in your opinion you were confining your judgment to that, but the evidence in this case, both by Clark and Sallee, and the contract says he represents all the family, and they had a special understanding that they represented Eleuteria Brown at the time the Lee Arenas case was filed. It is a hypothetical question based

(Testimony of L. R. Martineau, Jr.)

upon our evidence, not the opinion of the court. The opinion of the court has been set aside. This is a new case.

The Court: Suppose we allow him to finish his question, and then you can object and move to strike any portion of it.

Mr. Brett: I simply thought I had to direct your attention to that.

The Court: That will save your point and avoid any confusion, too. Let the Judge finish his question and then you can object to any part of it, or move to strike out any portion of it.

Mr. Preston: The hypothetical question is based upon [16] our contention of what the evidence shows.

The Court: Go ahead with your question.

Q. (By Mr. Preston, continued): That the complaint in said case was prepared and filed by Messrs. Clark and Sallee on December 24, 1940, and thereafter three amended complaints were prepared and filed; that the pleadings in the case presented extraordinary difficulties because of the unusual and unique legal questions and factual situations involved;

That two trials of said action were had in the District Court, and two appeals were conducted from the judgments of said court to the Circuit Court of Appeals for the Ninth Circuit, both of which were elaborately briefed by the attorneys herein; two petitions for rehearings were prepared and filed by them; two petitions for writs of cer-

(Testimony of L. R. Martineau, Jr.)

tiorari to the Court of Appeals were prepared and filed by them in the Supreme Court of the United States, with supporting records and briefs, the first of which petitions was granted and the cause was thereupon rebriefed, heard and orally argued in the Supreme Court, resulting in a reversal of the first judgment in said case, and the second petition for certiorari was denied by said Court on June 9, 1947;

That, in addition to the foregoing work done and performed in said case in the District Court, said attorneys prepared notice of appeal to the Circuit Court of Appeals and other papers necessary to present the appeal, including the [17] following: an opening brief of 45 pages, and an appendix thereto of 6 pages, in said Court of Appeals; a reply brief of 7 pages in said court; a petition for certiorari and supporting brief of 23 pages, and a record of 78 pages, in the Supreme Court of the United States; a supplemental brief of 25 pages in said Supreme Court; two of the attorneys, Messrs. Preston and Clark, appeared and orally argued the case in the Supreme Court on March 6 and 7, 1944; following reversal of the first judgment by the Supreme Court, said attorneys filed a third amended complaint in the District Court to conform to the opinion rendered by the Supreme Court, prepared the case for retrial, and retried the case in the District Court, the evidence and exhibits comprising about 600 pages; after a judgment favorable to Lee Arenas in the District Court, the Government ap-

(Testimony of L. R. Martineau, Jr.)

pealed therefrom to the Circuit Court of Appeals, and said attorneys prepared and filed a brief for Lee Arenas containing 39 pages; thereafter said attorneys filed a petition for certiorari and supporting brief of 15 pages in the Supreme Court, seeking a review of that portion of the judgment of the Court of Appeals holding that Lee Arenas was not entitled to the allotments made to his father and brother, with a record of 676 pages and brief of 32 pages, the writ being denied on June 9, 1947.

Assume: that attorneys Preston, Clark, and Sallee made court appearances of 50 or more in number, and that the number [18] of man-days spent in office work by them in the Lee Arenas case was from 250 to 300 such days.

Assume: that the following additional work was done and performed by attorneys Preston, Clark, and Sallee in the above-entitled action of Eleuteria Brown Arenas v. United States of America, to wit:

That the time of filing said action, to wit, on the 9th day of January, 1947, the Supreme Court of the United States had not decided the questions presented by the petition for certiorari filed in said Lee Arenas case by the United States of America, and that on said date said attorneys Preston, Clark, and Sallee did not, and could not, know exactly what the Supreme Court might hold in respect to said questions, nor the effect of its future decision upon the plaintiff Eleuteria Brown Arenas, and that because thereof said attorneys were compelled to review the law deemed applicable to said action.

(Testimony of L. R. Martineau, Jr.)

Assume: that after filing said action said attorneys entered into negotiations with counsel for the United States for the purpose of making unnecessary, or of shortening, the trial of this case and that as an incident thereto said attorneys prepared and submitted to such counsel a stipulation for judgment and form of judgment; that after a delay of several months and on or about the 20th day of November, 1947, Government counsel advised said attorneys that he had been [19] directed not to enter into any stipulation for judgment, or consent for judgment, in this case, and that on or about the 25th day of November, 1947, the United States filed its answer to the complaint in this action; that this action was tried before the Honorable Charles C. Cavanah, Judge, sitting without a jury, on the 30th day of March, 1948, that evidence was introduced on behalf of both plaintiff and defendant, and the case was orally argued before the court, the trial consuming two days; that said attorneys made numerous appearances in court for other purposes.

Assume: that thereafter the said attorneys prepared and filed on behalf of the plaintiff a brief of 16 pages in reply to the questions raised in the Government's briefs; that on the 20th day of May, 1948, the court filed its decision in favor of the plaintiff, upholding the contentions made by said attorneys in her behalf, and directed said attorneys to prepare and submit findings of fact and conclusions of law, and judgment thereon.

Assume: that said attorneys did prepare and sub-

(Testimony of L. R. Martineau, Jr.)

mit findings of fact and conclusions of law comprising 7 pages and judgment comprising 3 pages, which the court signed and entered on the 23rd day of June, 1948; that on the 20th day of August, 1948, the defendant gave notice of appeal from said judgment and the whole thereof to the United States Court of Appeals for the Ninth Circuit, but thereafter dismissed its said appeal. [20]

Assume: that, while said attorneys Preston, Clark, and Sallee have not kept an accurate detailed record of the time spent in the work done by them in the course of this litigation, they estimate that the number of court appearances, other than in the Lee Arenas case, exceeded ten (10) days, and that the number of man-days spent in office work on the case, and necessary to prepare the case for trial, exceeded ten (10) days.

Assume: in respect to the experience, ability, skill, and standing of John W. Preston, the following: that he was admitted to the practice of law in the State of California in 1902; that he is licensed to practice law in all of the state and federal courts in California, and in the Supreme Court of the United States; that from his admission to the bar in California in 1902 he was engaged continuously in the general practice in said State until 1913; that in December, 1913, he was appointed by the President as United States Attorney for the Northern District of California and served as such until July 24, 1918, when he resigned to accept the office of Special Assistant to the Attorney General of the

(Testimony of L. R. Martineau, Jr.)

United States for War Work, in which capacity he served until May 15, 1919, when he resigned to re-enter the private practice of law in San Francisco; that he engaged continuously in such practice until December, 1926, when he was elected as an associate Justice of the Supreme Court of California; that in 1930 he [21] was re-elected as such Associate Justice for a full term, but resigned from the court in September, 1935, to again engage in the general practice of law; that on October 1, 1935, he was appointed, by the President, as Special Counsel to represent the United States of America in the Elk Hills oil litigation and served as such counsel until October 1, 1941, said litigation resulting in a judgment in favor of the Government for restoration of the oil lands involved and more than \$7,000,000.00 in cash, the total value of the judgment being estimated at approximately \$40,000,000.00; that during the last-mentioned period he was also Special Assistant to the Attorney General of the United States in charge of tideland eminent domain proceedings in California; that on October 1, 1941, he re-entered the private practice of law in Los Angeles, occupying a suite of offices in the Rowan Building at Fifth and Spring Streets, and at all times since has been engaged in the general practice of law at the location; and assume that he has in his employ other competent lawyers and a secretarial staff, and that his annual expense for maintaining his offices and staff of attorneys and other employees is approximately the sum of \$20,000.00.

(Testimony of L. R. Martineau, Jr.)

Assume: in respect to the experience, ability, skill, and standing of Oliver O. Clark, the following: that he was admitted to the practice of law in the State of California in 1907, and that he is licensed to practice in all of the state [22] and federal courts in California and in the Supreme Court of the United States; that he has been actively and continuously engaged in the general practice since his admission to the bar in 1907, and has engaged in the trial of contested cases in the courts of most of the western states, except the states of New Mexico and Colorado, and has specialized in the trial of cases for and under employment by other lawyers.

Assume: in respect to the experience, ability, skill, and standing of David D. Salle, the following: that he was admitted to practice law in the State of Kansas in 1906, and there became familiar with Indian litigation; that he has specialized to some extent in corporation law, and in the reorganization and financing of corporations; that he removed from Kansas to California in 1909, and was during that year admitted to practice law in California; that ever since 1909 he has engaged in such specialized practice and also in the general practice of law in said state.

Assume: that the property judicially allotted in this case to the plaintiff Eleuteria Brown Arenas has a market value of three hundred thousand dollars (\$300,000.00).

(Testimony of L. R. Martineau, Jr.)

Now, assuming all of the facts stated in this question, do you have an opinion as to what is the reasonable value of the legal services rendered by Messrs. Preston, Clark, and Sallee, in conducting the litigation which resulted in the judicial allotment of said lands to the plaintiff and a [23] judicial declaration of her right to a trust patent thereto?

Mr. Brett: If the Court please, I object to and move to strike the following portions of the heretofore-stated hypothetical question on the ground that, as to the first of the matters, this court has ruled, and it is the law of the case, that such matter is not proper to be considered in fixing the value of services in this particular case, and I refer to the services in connection with the Lee Arenas case.

Second, that the court may take judicial notice that the trial of this particular cause, and I refer to the original cause in which the issue of the right of Eleuteria Brown Arenas to a trust patent was involved, did not involve two days, but involved but one day, to wit, Tuesday, March 23, 1948, as shown by the official original reporter's transcript of the proceedings of that date which are reported in a total of 39 pages.

My objection and motion to strike on the first part is directed to that portion thereof which directed the witness' attention to the work done and performed by these three petitioners in an entirely separate and different case, and under an entirely separate and different written contract with another

(Testimony of L. R. Martineau, Jr.)

Indian, Lee Arenas. On that point, I direct your Honor's attention to the fact that in your Honor's opinion filed in the previous proceedings in this case, and now appearing on pages 47 and 48 of the printed transcript [24] of the record on appeal, which has been received as Petitioners' Exhibit 8, the court said in part as follows:

"In approaching the consideration of this question"—referring to the reasonable attorneys' fees and expenses—"the court is confined to the extent of the services rendered by petitioners in the preparation and trial of the present action, as disclosed by the evidence, for it will be remembered that the primary question here, as to the right of an Indian to an allotment under similar circumstances, was litigated and determined in the case of *Lee Arenas v. United States*, supra, and the District Court in that case has allowed petitioner an attorney fee of an interest of 22½ per cent of the allotment there involved and impressed a lien thereon."

The court there expressly excluded the right to consider the work in that other case.

I also direct your attention to the fact that in the pleadings in this particular case, the United States and Eleuteria Brown Arenas specifically admit that she was entitled to the trust patent if she could show one of two things: either that she had been adopted by Lee Arenas, or that there was a legal manner in which someone else could act for her; insofar as her rights otherwise were concerned, it was ad-

(Testimony of L. R. Martineau, Jr.)

mitted in the answer of the United States and [25]
in the answer of Eleuteria Brown Arenas.

Your Honor will also recall that very shortly after the trial a communication was addressed to your Honor, which is in the records and files in this case, in which, it having come to the attention of counsel for the Government, that there was an instruction authorizing this man, Wadsworth, to make a selection, the Government then conceded judgment, because it had conceded all other matters.

Under those circumstances, I respectfully submit, including in this hypothetical question and asking this witness to include as one of his questions of fact the work which these counsel did in an entirely separate proceeding, and for which they are to be compensated in an entirely different proceeding before another court, is not a proper and lawful matter to be considered in this proceeding.

The second matter is the hypothetical question directed the witness to consider two days trial time were required in this proceeding. As I said, the official transcript of the proceedings in the case involving the trust patent shows that that hearing before this court on the trust patent issue was a partial one-day hearing on Tuesday, March 23, 1948, which was reported in a total of 39 pages of the reporter's transcript.

Mr. Preston: We will look at the minutes of the court on that. You haven't considered the minutes of the court. [26]

The Court: Those are your two objections?

(Testimony of L. R. Martineau, Jr.)

Mr. Brett: Those are the two objections.

The Court: What have you to say?

Mr. Preston: Your Honor, here is our position. This Eleuteria Brown Arenas took the name of Arenas and was in his family and lived as a member of his family. The deposition of Mr. Sallee and the deposition of Mr. Clark both say that the contract with Lee Arenas at the time they were first employed embraced the taking of her case along with the other case, the test case. There wasn't any use of putting two cases up to make a test case. We had the case on hand. The contract made with Lee Arenas refers, in my opinion, to this very situation, because it contains a clause that he is to represent the family, and she was at that time a member of the family. Of course, he signed as her father, if you will remember, at the time of the allotment proceeding, and counsel objected, and later on we found written authorization for him to represent her.

When we put up the hypothetical question, your Honor, we have a perfect right to assume that the evidence shows that the Lee Arenas case was a test case, and we had this case on hand, as well as the cases of all the other Indians, at the same time.

It isn't fair to say that the Lee Arenas case comprises all the service for which we are entitled to be paid, because [27] this case is connected with it and a part of it. I am asking him simply to assume that this case was allied to and came on at the time of the Lee Arenas case. I think it is perfectly

(Testimony of L. R. Martineau, Jr.)

proper for him to express an opinion based on that, even though your own opinion, at the time you wrote the opinion, was that we couldn't consider it. You may reconsider it after looking at this case.

Every court has the right to reconsider its ruling in the matter of what is to be considered and what is not evidence.

Mr. Brett: I don't know that I can find the material I want as quickly as I would like, but I would say to your Honor that the record of the testimony of David Sallee and Oliver O. Clark, which is in the transcript which has been received as Exhibit 8—

Mr. Preston: It is in the depositions.

Mr. Brett: Both show, at the time the contract of Eleuteria Brown Arenas was signed, she was living separate and apart and in another residence. She had a child. At least, she had been married. I don't know whether she was married at that particular time. It also contains an express statement—I will find it in a few minutes—by Judge Preston in which he conceded that the contract was a general term of contract to cover various Indians and that the use of the word “family” there did not apply to Eleuteria Brown Arenas and they did not so consider it or urge it. [28]

As the court's opinion shows and as this court can take judicial notice of, those other proceedings were the subject matter of an entirely different case, and a very substantial award was made.

It is true that, like this case, it is subject to

(Testimony of L. R. Martineau, Jr.)

further consideration in fixing it in money, but I can't believe that this court is going to assume that that trial judge is not going to consider that it was an important case and that they are entitled to very substantial fees, having once done so and likewise fixed a percentage.

I submit that under the circumstances of this case, where this employment was after the work had been completed and was under an entirely separate contract, it would not be proper for this court to award double compensation for the same services, which is what would be done if you did that here.

This very witness, as he has stated on his voir dire, testified in the other case and gave his opinion as to the value of those services.

I submit it would be unfair and unjust and improper to have him consider and award additional fees or duplicate fees to these peititoners for the same services in this proceeding.

Mr. Preston: I am not asking for any duplicate fees. We are only asking that it be considered that this case had its roots in the Lee Arenas case, that it was on hand at the [29] time, had consideration at the time, and it was kept in consideration from that time on until the case was started and tried.

I think it is perfectly fair to do that. Suppose we had a dozen cases and you pick up one of them. You don't take your services in just one case. You take your services in the whole field covered by the situation at that time.

(Testimony of L. R. Martineau, Jr.)

As for the contract signed by this woman, that was a later case. There wasn't anything said about that and that has no place in preparing what we are talking about here. The Lee Arenas case refers to the family.

Sallee and Clark both say in the deposition before you, it was understood the Brown case would wait until we tried the other. I think it is akin to it, it is connected with it, and some value should emanate from this situation, in addition to the ordinary case as if we were employed after the Lee Arenas case.

Mr. Brett: May I be heard briefly?

Mr. Preston: You have been heard before. I get the last say.

Mr. Brett: I want to point out another thing. In the answers filed on this trust patent case, as I understand it, what your Honor is now here intending to do, is required to do under the mandate, is to fix the fees of the three attorneys who are petitioners in this particular patent case, [30] that is what they are asking the lien for—the answer filed, and I am reading from the answer itself:

“Defendant denies the allegations contained in paragraph VI of the plaintiff's complaint, but admits that if plaintiff can establish that on and after January 8, 1927, she was a member of the Palm Springs Band of Mission Indians; that she was then and now is the adopted daughter of Lee Arenas; that the selections of the lands described in paragraph III of plaintiff's complaint were

(Testimony of L. R. Martineau, Jr.)

chosen and made by someone authorized to act for and in behalf of the plaintiff (who was then a minor and who was then incompetent to make such selection in her own behalf) prior to May 9, 1927, then plaintiff has done and performed everything that she could do and which the law then required her to do as a condition precedent to obtaining a trust patent under the provisions of Title 25, U.S.C., Section 345, Stat. 760, under the principles established in the final decisions in the cases of *Arenas v. U. S.*”—and so forth—“and that by reason thereof, plaintiff has become entitled to the issuance to her, in the manner provided by law, of an allotment trust patent in severalty to the lands described as Parcels (a), (b), and (c) in paragraph III of plaintiff’s complaint, effective as of and to commence [31] to run from May 9, 1927, but that, failing proof of such condition precedent, she is not entitled thereto.” [32]

Mr. Preston: What has that got to do with this case? Not a thing in the world.

Mr. Brett: Just a minute, Judge.

Mr. Preston: You have been over it once or twice already.

Mr. Brett: In the reporter’s transcript in the trust patent case, Judge Preston made this statement, on page 34, and I think the court will remember it:

“Mr. Preston: This is the first time I have ever tried a case where everything was admitted in the answer except a few things.”

(Testimony of L. R. Martineau, Jr.)

Those were whether she was adopted and someone else had to make a selection for her.

Mr. Preston: What value has that to the question?

Mr. Brett: The record also discloses when it was discovered, not at the trial, it was not offered at the trial, counsel didn't have it before them, and counsel for the Government didn't know about it, it was clearly apparent, but after we had started writing briefs and submitted them to your Honor, counsel for the petitioners discovered there was existing a direction to this special authorized agent which authorized him to make a selection for orphans or those not adopted, and the Government stipulated with counsel and the court approved a stipulation be filed in which a copy of that authorization be filed, and when that was done, the writer, as one of the counsel for the respondent, directed a [33] letter, and the original was filed in the case, to your Honor at your residence in Boise, Idaho, because at that time you had returned, dated May 3, 1948, in which the Government then expressly confessed that in the light of that subsequently discovered evidence, that Wadsworth had an authorization to make a selection, Eleuteria Brown Arenas was entitled to a trust patent.

Mr. Preston: What has that got to do with this?

Mr. Brett: The confession that she was entitled to a trust patent if she was either adopted or someone else had the right to make a selection, the

(Testimony of L. R. Martineau, Jr.)

determination after the trial, or the determination that such a right existed, and the immediate concession by the Government that she was then entitled to judgment on the trust patent, would make it unjust and unfair to have this court consider, in such a short proceeding, since that was practically all we touched on, since that was conceded, with this bit of evidence, all those matters which are attempted to be brought out here.

Mr. Preston: Am I going to get through this time or are you going to answer it again?

What he has said about finally conceding that Lee Arenas had the right to make, to select an allotment for Eleuteria Brown Arenas, is true, but it came after the case had been submitted and briefed, and we happened to discover it ourselves. Then it was admitted. It is true they yielded at [34] that time, but they fought every inch of ground up to that point.

I have this suggestion to your Honor in this matter here. Let the witness answer the question as put, and then eliminate the Lee Arenas case, and he can answer that. If he does, it will be all right with me. Then you will have it both ways before you.

We are entitled to have this question answered, because our testimony shows that it was a part of the Lee Arenas case in the beginning. We are entitled to all of that, we think, but if the court disagrees with us, we can have the testimony both ways. Let him answer the question as put and then

(Testimony of L. R. Martineau, Jr.)

eliminate that part, and if he can answer it, it is all right with us.

The Court: Are you through?

Mr. Preston: As far as the days in court are concerned, the minutes of the court will show whether it is one day or two days.

Mr. Brett: Did you ask if I was through?

The Court: Yes. I want to know if counsel are through, so I can make some ruling.

Mr. Brett: I am through, yes.

The Court: The court realizes that under this objection made by the counsel for the Government, we have here presented services rendered in two cases. One involves a case in which [35] the services of the attorneys are to be fixed, which is now pending in another court.

Mr. Brett: Yes, sir.

The Court: Under the mandate of the Circuit Court of Appeals which I am here now trying to consider, when we had this matter before this court as to the amount of the reasonable value of services for attorneys' fees at that time, we proceeded on the theory of the valuation of the allotment and fixed a percentage amount of whatever it may be. The Court of Appeals said that this court now has to fix the value of the reasonable attorneys' fees in dollars and cents, fix a definite amount.

We realize that there are some services rendered in these two separate cases. In the main case, which went to the Supreme Court of the United States, the fees, attorneys' fees, are still pending before

(Testimony of L. R. Martineau, Jr.)

another district judge here on a similar mandate from the Court of Appeals.

Now, is this court to undertake to fix the amount of attorneys' fees for services rendered in that case? The court over there will have to fix those attorneys' fees. There is likely to be a duplication to some extent in presenting to the court evidence that the court would have to listen to here and determine a definite amount of attorneys' fees in dollars and cents. Now, we have to consider the mandate of the Court of Appeals. That is the confusion you [36] would get into if the court tries to consider services in both those cases in fixing attorneys' fees in this case, which is separate.

I think I should let the question stand, with the reservation of ruling, either sustaining your objection or overruling it, in considering this separate case or not considering it. I will rule upon that at the close of the case, as to whether I should or not.

I can appreciate where we have got two cases still pending. In fixing the attorneys' fees, which involve, of course, the services that enter into both, to a certain extent, the main case went to the Supreme Court and that is still pending as far as fixing the attorneys' fees is concerned under the mandate of the Court of Appeals. I have to watch so there won't be a duplication here where you are going to be taken care of in fixing attorneys' fees in the main case, the one allowing the trust patents, and you were the attorneys in that case.

(Testimony of L. R. Martineau, Jr.)

Then, if I would allow it and the other court would allow it, there might be a duplication to a certain extent in fixing a definite amount of attorneys' fees in dollars and cents. That is the confusion we have here.

So I think this court should allow the witness to answer the question presented, reserving the right to rule upon your motion to eliminate what you claim covers your objection. [37] Then we won't have to go over it again.

So that will be my ruling for the present. You may proceed.

Q. (By Mr. Preston): Are you ready to make an answer? A. I am, sir.

Q. What, in your opinion, is the reasonable value of the legal services if it be assumed that said property has a market value of \$300,000.00?

A. \$75,000.00.

Q. If you were to assume it had a market value of only \$200,000.00, have you figures on that?

A. In my opinion, a reasonable fee would be \$55,000.00.

Q. And if it went as low as \$100,000.00, what would be your opinion?

A. I think the fee should be at least \$30,000.00 and perhaps more, in order to be reasonable.

Mr. Preston: Cross-examine.

(Testimony of L. R. Martineau, Jr.)

Cross-Examination

By Mr. Brett:

Q. Now, Mr. Martineau, you have considered as one of the factors, in stating the opinion which you have just stated, the services which the three petitioners rendered in the various proceedings heretofore described by Judge Preston in his hypothetical question, in arriving at the final determination in the Lee Arenas case, Case 1321? [38]

A. Yes. And if I may explain, I have considered a good many more matters than Judge Preston brought out on my direct examination.

The Court: You are to tell me what you are testifying to, not something you are retaining in your mind.

The Witness: I beg your pardon.

Mr. Brett: I didn't hear the ruling of the court.

Mr. Preston: I didn't either.

The Court: He said he considered a lot of matters you didn't bring out in your question. I want to know what they are.

Mr. Preston: Yes, I think so.

The Court: I don't want something he has in mind.

Mr. Preston: Shall I take him to ask him what they are?

Mr. Brett: I assume that would be part of the direct, or I can cross-examine him.

Mr. Preston: I thought you would cross-examine him thoroughly and you would get it all.

(Testimony of L. R. Martineau, Jr.)

Mr. Brett: You may proceed.

Mr. Preston: No. I am not wanting to proceed.
Go ahead.

Q. (By Mr. Brett): Then you did consider the services rendered in Case 1321-O'C, which is the Lee Arenas case? A. I did.

Q. Would your opinion of the value of the services be [39] different if you had eliminated those considerations entirely? A. It would not.

Q. Did I understand you read the record in this particular case?

A. I read such of the record, Mr. Brett, as was submitted to me. I don't know whether I read the record as we define it, as certified by the clerk to go to the Circuit Court of Appeals in the matter. In other words, I am not certain that all documents have been submitted to me, because you remember that the record contained a good many items on pleadings and otherwise that may not appear in the transcript. I don't know. There were many orders, and so forth.

In other words, I haven't made a study of the procedural aspects of the record, not deeming them to be material.

Q. Do I understand, when you describe the matter as procedural aspects, that you refer to the reporter's transcript of the proceedings in the trial? You did not consider that?

A. If you will show me what you are referring to, I think, Mr. Brett, I can answer your question.

Mr. Brett: May the record show that I am hand-

(Testimony of L. R. Martineau, Jr.)

ing to the witness a document entitled "Reporter's Transcript of Proceedings, Los Angeles, California, Tuesday, March 23, 1948," pages 1 to 39, inclusive.

The Witness: The answer to your question is yes, that [40] was submitted to me by Judge Preston.

Q. Did you consider the pleadings that had been filed by the respective parties in respect to the issue of the right of Eleuteria Brown Arenas to a trust patent? A. I did.

Q. Did you consider the supplemental stipulation which was entered into between the Government and the petitioning attorneys, in which it was stipulated, following the trial and submission to the court, that an exhibit be permitted to be filed, which disclosed that the Commissioner of Indian Affairs had authorized the Special Allotting Agent Wadsworth to make a selection for minors and for orphans? A. I did.

Q. And did you consider the communication from counsel for the Government directed to the Honorable Charles C. Cavanah, Boise, Idaho, dated May 3, 1948, in which the Government conceded that Eleuteria Brown was entitled to her trust patent?

A. I think I never saw that letter or communication to Judge Cavanah at Boise. I heard you refer to it in your argument for the first time this morning.

Q. Well, if you would assume that in the pleadings filed by the respondents to the issues involving Eleuteria Brown Arenas' right to a trust patent,

(Testimony of L. R. Martineau, Jr.)

it was conceded she was entitled thereto if she could show one of two things, or [41] both, that is, that she had been adopted by Lee Arenas, or, if not adopted, that someone else had been authorized to make selections for her, would that——

Mr. Preston: Are you through?

Mr. Brett: No.

Mr. Preston: I wish to object to that question, if your Honor please, this line of examination. The facts are that this Government took an appeal after your decision, absolutely took an appeal, and after we had whipped them, they had filed briefs and denied the adoption, denied the selection, denied the power of Lee Arenas to make a selection; then, when we found these documents, he yielded at the end of the last step, he couldn't go any further. They actually appealed this case, and filed a notice of appeal, after your decision. It is not fair to try to get the record in any such form as they want. The witness has testified from a hypothetical state of facts, and to cross-examine him about what he considered elsewhere is really not germane to the issue, anyhow.

Mr. Brett: I hadn't finished my question, but if the court wants to rule on it before it is finished, all right.

The Court: Go ahead and finish your question.

Q. (By Mr. Brett): If you would assume, as a part of the hypothetical question, first, that in the pleadings filed by the respondent Indian and by the Government in her behalf, [42] it was conceded

(Testimony of L. R. Martineau, Jr.)

that she was entitled to the relief prayed for in the complaint if she could show one or both of two things, to wit, that she had been adopted by Lee Arenas, or that someone else was authorized to make a selection for her, she then being a minor, and if you would further assume that in the hearing and during the entire period thereof until submission to the court no record was offered or received in evidence on behalf of the petitioners that any person would have authority to make selection for her, the only issue therein being the question of whether or not she had been adopted; and if you would assume that subsequent to the submission to the court upon that issue petitioners discovered and submitted to the respondents a written communication which disclosed that the Special Allotting Agent did have an express authorization from the Commissioner of Indian Affairs to make selections for orphans or for minors, and that upon receiving that the Government stipulated with petitioners that such document be received in evidence as though offered during the trial; and that thereafter the Government by communication to the trial judge, the Honorable Charles C. Cavanah, informed him that the Government conceded that the petitioner, the Indian, Eleuteria Brown Arenas, was entitled to the relief prayed for in her complaint;

That the total proceedings in trial took less than one day;

(Testimony of L. R. Martineau, Jr.)

And assume that subsequent thereto the Government took what is termed a protective appeal until the matter could be submitted to Washington, and then dismissed it within a week, before any other proceedings were taken, any other record prepared or filed, except the notice of appeal;

Would that change your opinion as to the reasonable value of the services rendered by the petitioners in this proceeding?

Mr. Preston: I object to the question as too involved to enable anyone to make an intelligent answer.

The Court: After all, the primary question here on this proceeding is, What was the extent of the services rendered by the attorneys for the petitioner up to a certain time?

Mr. Brett: Yes, sir.

The Court: That was presented to this court and ruled upon, and then an appeal was taken by the United States. Thereafter, you concluded to withdraw the appeal.

The question is, What was the extent of the services rendered by counsel up to that time? The mere result of the case as to the United States, the Government, withdrawing their appeal, goes to the question of what was the final determination of the case. It doesn't affect the amount or extent of the services rendered by counsel up to that time. That is the question here involved, not what was determined afterward by some appellate court or by one of the parties withdrawing the appeal, which was

(Testimony of L. R. Martineau, Jr.)

done, as you say, in a [44] letter addressed to me when this case was under advisement.

That doesn't affect at all or reduce the services rendered by petitioners, the mere fact that the Government withdrew their appeal after that time. That is what I am going to have to consider here under the mandate from the Court of Appeals.

Mr. Preston: And, furthermore, before we found these two letters, why, we had gone through all the agony of presenting the case and briefing it and everything else.

The Court: You propounded to the witness the facts up to the time you rendered all the services you are now claiming for. The result of that is——

Mr. Brett: Your Honor, I intend to interrogate the witness more specifically, but I think I am entitled to an answer to that question, as to whether it would change his opinion.

The Court: It doesn't affect the services they rendered. I will let him answer.

Mr. Preston: If he can answer it, all right.

The Court: You may answer. Are you all confused now? Let the reporter read it.

The Witness: It is difficult to get me confused after this many years at the bar. I think I understand the question that Mr. Brett has propounded.

The Court: Very well.

The Witness: Upon the assumption that these various [45] concessions had been made by the Government, which he enumerated in his question, and the ultimate disposition of this case, which was

(Testimony of L. R. Martineau, Jr.)

taken on appeal by the Government and by them dismissed, his final inquiry is as to whether or not my opinion as to the value of the services rendered in this particular case, this Eleuteria Arenas case, would be in any way modified if I made the assumption propounded by Mr. Brett.

Do I have the substance of your inquiry?

Q. (By Mr. Brett): I think you do. The inquiry is, Would those circumstances modify your opinion in any respect as to the reasonable value of the services?

A. They would not in any way modify the extent of the value under a quantum meruit of the services rendered in this particular proceeding we have here this morning, for the reason that, first of all, I wish it definitely understood that, as a member of this bar, I would be as much opposed as his Honor or you or Judge Preston to any duplication of fees, but I must say to you, in explanation of my answer, that one cannot take the particular proceeding which we have here this morning and not take into consideration the factors that I mentioned earlier, which have not been brought out on my direct examination, namely, the history of this entire litigation, together with the allied cases, and the duty of Judge Preston, Mr. Clark and Mr. Sallee, as attorneys for this particular Eleuteria Arenas this morning, or Lee Arenas, [46] or any other individual, in order to arrive at what I consider substantial justice.

(Testimony of L. R. Martineau, Jr.)

Under those circumstances, one has to take into consideration the factors which were not only disclosed by the decisions of the courts, which I read, and which are alluded to in the Federal Reporter, as well as in the Supreme Court of the United States, but they are also referred to, in part at least, or certain decisions are referred to, in the memorandum which has been presented to his Honor this morning regarding the matter here in issue.

Those are the matters, and those are the only matters, if the Court please, as to which I had not disclosed the factors which I considered as existing before giving the definite figures which I submitted in answer to Judge Preston's question.

Mr. Preston: Now, Mr. Martineau, let's fix the——

Mr. Brett: Your Honor, may I have your permission to examine the witness on the matters involving the Lee Arenas case and still reserve my objection? Your Honor hasn't ruled, and if you should rule against me, it would be proper to cross-examine, but I don't want to bar myself by examining on those matters, so I ask your permission, in view of the fact that you have not ruled.

The Court: Go ahead. You may do so.

Q. (By Mr. Brett): First, in reference to Case 1321—— [47]

A. Which case do you mean?

Q. The Lee Arenas case. A. All right.

Q. In the Lee Arenas case, you learned that at

(Testimony of L. R. Martineau, Jr.)

the time that this proceeding was instituted, all briefs had been filed in the Supreme Court of the United States in connection with the petition for certiorari, is that your recollection?

The Court: Would you please read that question.

Q. (By Mr. Brett): Is it your recollection, as a part of your study of the work that these petitioners did in connection with Case 1321-O'C, which is the original Lee Arenas case, that when this particular complaint for a trust patent was filed in this present Action 6221, all of the briefs by these petitioners in the Supreme Court had already been prepared and filed; is that your recollection?

A. My recollection is that when I testified in the Lee Arenas case concerning the reasonable value of services in that case, I had read the transcript and the briefs which had then been filed. I do not know whether that answers your question, Mr. Brett, or not.

Q. It does not, Mr. Martineau. My question is a matter of this. You have stated, as I recall your direct examination, and in connection with the hypothetical question upon which you gave your answer of value——

A. That's right. [48]

Q. ——that you considered the work which was done by these petitioners in the Lee Arenas case and had read all the briefs and had read the decisions, both antecedent to the final decision in that case and

(Testimony of L. R. Martineau, Jr.)

the various decisions in that case. Is that not a correct resume of what you testified?

A. That is true, if you will define the word "considered." Otherwise, not.

Q. Would you tell the court, please, because I don't know what you meant by the word "considered." What did you mean?

A. Do you want a definition of the word "considered" or do you want me to explain what I meant?

What I meant, Mr. Brett, was that obviously I took into consideration the fact that Judge Preston, Mr. Clark, and Mr. Sallee had done a very large amount of work in connection with the Lee Arenas case.

In considering the large amount of work they did, I correspondingly made my answer to the Judge's hypothetical question to me on direct examination much less than it otherwise would have been, for the reason that I do not believe that there should be a duplication of fees to any attorneys for like work. I consider that they were better prepared than any three lawyers I would know to take up the case which we have here before us this morning. [49]

So, in considering this case just on its own feet, having considered or thought about the work they had done previously, I did not use that as a factor in any other way than I have just described.

Q. Mr. Martineau, on a few occasions I have found it necessary to be a witness, and I realize

(Testimony of L. R. Martineau, Jr.)

there are difficulties in a lawyer being a witness. I want you, if you can, please, to answer me specifically on a couple of points.

One, as a part of your consideration in giving your answer as to value, was it your belief that at the date the complaint was filed in this particular case, all of the briefs filed by these petitioners in the Supreme Court of the United States in the Lee Arenas case had already been prepared and filed?

A. In view of my recollection of the chronology and of the time that the Lee Arenas case was heard here before Judge Mathes, my idea is that the substantial work which was done in the case now before us may have been done subsequently, so far as the preparation of briefs is concerned.

Q. Maybe I can aid you a little.

A. I don't believe, Mr. Brett, if I may be permitted as a lawyer to say so, I need any aid. All I am trying to do is state what I believe to be the truth.

Q. What I am trying to say is this, Mr. Martineau. When I refer to the work being done in a brief filed in the [50] Lee Arenas case, I am referring to that portion of the Lee Arenas case which was stated in the hypothetical question to you and which related to the final adjudication that Lee Arenas was entitled to a trust patent. I am not referring to the ancillary proceeding before Judge Mathes in which the petitioners, as here, were seek-

(Testimony of L. R. Martineau, Jr.)

ing in that petition to recover fees and to enforce their rights to fees. A. Yes.

Q. With that understanding in mind, did you believe and assume as a part of your assumptions in answering this hypothetical question that when the complaint was filed in this case for Eleuteria Brown Arenas by these three attorneys, that they had already prepared and had already filed in the Supreme Court all of their briefs and authorities which involved the trust patent issue in the Lee Arenas case, with the Supreme Court of the United States? You can answer that yes or no, please.

Mr. Preston: Just a moment. The hypothetical question ought to be read to him at that point.

The Witness: I have it before me.

Mr. Preston: Page 5, line 13:

“That at the time of filing said action, to wit, on the 9th day of January, 1947, the Supreme Court of the United States had not decided the questions presented by the petition for certiorari filed in [51] said Lee Arenas case by the United States of America, and that on said date said attorneys Preston, Clark, and Sallee did not, and could not, know exactly what the Supreme Court might hold in respect to said questions, nor the effect of its future decision upon the plaintiff Eleuteria Brown Arenas, and that because thereof said attorneys were compelled to review the law deemed applicable to said action.”

The hypothetical question doesn't say anything about whether the briefs were all in or not. I don't

(Testimony of L. R. Martineau, Jr.)

understand that is a proper question, and if it is, and if he knows whether the briefs were in or not, he knows more than I do. I don't know.

Mr. Brett: I think on cross-examination I am entitled to elicit all the consideration that the man gave.

Mr. Preston: It won't do you any good.

Mr. Brett: He can answer whether he believed one way or another, your Honor.

The Court: He may answer.

The Witness: I have no knowledge of when the briefs filed by other attorneys were filed or whether the briefs to which you allude were all filed or not. The answer, therefore, is no, I don't know whether they were or were not filed.

The Court: You have answered the question now. Go [52] ahead.

Q. (By Mr. Brett): The second question is this. Is it true that you have consulted with these petitioners, have examined their briefs and records, and that you came to the conclusion as to whether or not they had made complete preparation at the time they filed this Eleuteria Brown Arenas suit for the work which was to be done in the Lee Arenas case, or is it not true?

Mr. Preston: I don't understand that question. May I have that reread, please?

(The question was read by the reporter.)

Mr. Preston: Whether the work in the Lee Arenas case was finished or not? Is that what you mean? Why don't you ask him a simple question?

(Testimony of L. R. Martineau, Jr.)

Mr. Brett: I will make it simple.

Q. Did you believe, in fixing this value, that these attorneys would have to do additional preparative work in the way of briefing and other work necessary to an appeal on the issue of whether or not this Indian or Lee Arenas was entitled to a trust patent at the date that this complaint in this action was filed?

A. Certainly not. I confined my answers to the hypothetical question put to me.

Q. If I understand your answer correctly, you then believed, as far as that issue was concerned, these attorneys [53] were completely prepared and had familiarized themselves with the law, as far as they could?

Mr. Preston: Just a minute. We object on the ground it is contrary to the opinion in the hypothetical question. The hypothetical question says they had to review the law before they filed the Eleuteria Brown case. The question is the antithesis of that.

Mr. Brett: My question is what he has just answered, which is proper on cross-examination.

The Court: You may answer.

The Witness: Would you read the question?

(The question was read by the reporter.)

Q. (By Mr. Brett): In reference to the right of these Indians to a trust patent?

A. No, I didn't believe that.

Q. Well, now let's very briefly go over the issues that were involved in the Lee Arenas case.

(Testimony of L. R. Martineau, Jr.)

You are familiar with those issues, are you not?

A. I was familiar with them.

Q. Are you still familiar with them?

A. Insofar as my recollection is good.

Q. The issue in that case then involved these factors: one, whether said selections made by a Special Allotting Agent in 1923 were enforceable or not——

Mr. Preston: No, 1923 and 1927. [54]

Mr. Brett: If the Court please, Judge Preston has practiced a long time and so have I. I don't think it is fair to interrupt me.

The Court: Go ahead.

Mr. Preston: He has no business assuming things to be facts if they are not facts.

The Court: Just a minute. You may correct that when he gets through, Judge Preston. Go ahead.

Q. (By Mr. Brett): Do you understand the question?

A. I would like to have the question repeated, because you are asking for a date over 20 years ago.

Q. Now, Mr. Martineau, you understand that the Lee Arenas case, 1321——

A. Yes.

Q. ——which was referred to in the hypothetical question, is the case which was commenced in 1940, reaching the Supreme Court, and it had a final decision there in 1944, do you not?

A. I am familiar with that case.

Q. You are familiar with the fact that in the Supreme Court there was a review under certiorari

(Testimony of L. R. Martineau, Jr.)

of the decision of the Circuit Court of Appeals of the Ninth Circuit? A. Yes.

Q. You are familiar with the fact that there were [55] several issues which were involved in that review? A. Yes.

Q. One of the issues was the question of whether or not the 1923 selections for allotment made for Lee Arenas by a Special Allotting Agent were valid and enforceable.

A. I am familiar with the fact that one of the issues involved the validity of those allotments.

Q. All right.

A. Whether that be dated 1923 or 1927, or whatever date it is.

Q. All right. Are you familiar with the fact that on that particular issue the Court of Appeals had determined that the 1923 selections were not valid?

Mr. Preston: At what time is this?

Mr. Brett: That is when it was on review before the Supreme Court under certiorari.

The Witness: In what case?

Q. (By Mr. Brett): In the Lee Arenas case.

A. I am familiar with the decision of the Circuit Court of Appeals in the Lee Arenas case. I am not certain about your 1923 date, Mr. Brett.

Q. Are you familiar with the fact that the second issue there was whether or not the 1927 selections made by a Special Allotting Agent for Lee Arenas were valid?

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: Which case is this, now? The first appeal [56] or the second? The first certiorari or the second?

Mr. Brett: It is the first certiorari. No, I am referring to the second certiorari.

Q. Are you familiar with the fact that another issue was whether or not the 1927 selections for allotment by a Special Allotting Agent for Lee Arenas were valid?

A. I am familiar with that.

Q. And the issue before the Supreme Court was whether or not the Court of Appeals had correctly decided that issue by holding that they were valid insofar as Lee Arenas and the deceased wife of Lee Arenas were concerned?

A. That's right. The best record is the opinion of the court.

Q. Are you familiar with the fact that at that time, which was in 1944, the Supreme Court had already decided in the first certiorari proceeding, the first appeal, that an act of Congress was a mandatory direction to the Secretary of the Interior to make those particular allotments?

Mr. Preston: I object to that on the ground that is not a correct characterization of the opinion. The opinion was that it was the duty to make allotments in general, but not specific.

Mr. Brett: I will amend my question.

Q. Are you familiar with the fact that upon the first appeal the Supreme Court had decided that an act of Congress [57] had made it mandatory that

(Testimony of L. R. Martineau, Jr.)

the Secretary of the Interior make allotments in severalty, that is, allotments in trust patent in severalty, to members of the Palm Springs Band of Indians?

The Witness: As a member of this bar, I submit counsel's question asking me to give my opinion concerning his characterization, or whether I am familiar with his characterization of a written opinion which I have in my library, is unfair to me as a witness. If counsel will come at this thing from a point of view that will enable me to discriminate between the amount of work done in the one case and in the other, I could very quickly shorten the proceeding, I think, for him, because I don't think Mr. Brett and I have any animus or ill will toward each other. We are trying to arrive at a record here. I submit, therefore, that it is not within my duty as a witness to try to characterize what can be so readily read by any member of the profession. Therefore, I submit, for me, as a special privilege, if the Court please, this line of questioning is unfair to me or to any other lawyer who might be called in my stead.

Mr. Brett: If the Court please, I have the greatest regard for Mr. Martineau, and no animus. I think my questions are proper, but in order to make time, I will proceed to something else.

May I ask the bailiff to bring me 322 U. S., please? [58]

The Court: Go ahead.

Q. (By Mr. Brett): Mr. Martineau, as a part

(Testimony of L. R. Martineau, Jr.)

of this hypothetical question, your attention was directed to this work upon the part of these three petitioners in the second appeal before the Supreme Court, to wit, the petition for certiorari—I will have it here in a minute, and I will read the text of it and you will know what I mean. Page 4, line 31:

“Thereafter said attorneys filed a petition for certiorari and supporting brief of 15 pages in the Supreme Court, seeking a review of that portion of the judgment of the Court of Appeals holding that Lee Arenas was not entitled to the allotments made to his father and brother, with a record of 676 pages and brief of 32 pages, the writ being denied on June 9, 1947.”

Are you familiar with that part?

Mr. Preston: I am willing that part of it go out of the question.

The Witness: Will you specify the lines you wish to have go out, then?

Mr. Preston: What page is that on?

Mr. Brett: Page 4, line 31, beginning with the word “Thereafter,” and ending “on June 9, 1947,” page 5, line 4.

Mr. Preston: I am willing that go out. [59]

Q. (By Mr. Brett): In view of that concession, as an experienced trial lawyer and one experienced in briefs, would you not say that in itself was a substantial part of the work of this counsel, to prepare a petition for writ of certiorari in the Supreme Court, to go over a record of 676 pages and to prepare briefs in an endeavor to set aside the

(Testimony of L. R. Martineau, Jr.)

decision of the Circuit Court of Appeals of this circuit?

Mr. Preston: That is the Lee Arenas case, and I am willing it go out, and if it lessens the value of the services, all well and good.

The Court: He asks that that be eliminated now.

Q. (By Mr. Brett): Then you eliminate that phase from your consideration of the services that they rendered.

A. Certainly, by stipulation of counsel, but I wish to explain the answer.

The Court: You have answered the question. Go ahead.

Q. (By Mr. Brett): You state, Mr. Martineau, among other things, you considered also the opinion of the Supreme Court of the United States filed in March, 1944, in the first Arenas appeal, and which is reported in 322 U. S., commencing at page 419. I will show you the book.

The Witness: By leave of court, I would like to say part of this discussion between me and Mr. Brett arises out of apparently a difference of opinion between Mr. Brett and myself as to what I considered. When you attempt to determine [60] what a man considered, you are off in a metaphysical realm of some sort. It may involve a great many things, the law of this land, the law of this State, the law of the Supreme Court, Canon 12 of the American Bar Association, with specifies the factors, as I prefer to call them, which are involved in the determination of a fee. That is the basis for

(Testimony of L. R. Martineau, Jr.)

the prolonged examination here, if the Court please.

I am familiar with this case in 322 U. S., commencing at page 419.

Q. (By Mr. Brett): Before I examine you on that opinion, there is something that occurred to me and I don't want to lose track of it. A minute ago, in replying to a question, you referred to earlier matters in connection with these trust patents. Did you consider, as a part of your consideration of the value of the services of these particular petitioners, the services that were rendered by other counsel, entirely separate and apart from these parties, in the so-called Sainte Marie cases, which were the original decisions involving the validity of trust patents?

Mr. Preston: I don't understand that anything has been said about it, that Sainte Marie case. I have never asked him anything about it.

The Court: Do you object?

Mr. Preston: I do object, if your Honor please, on the ground it doesn't appear to be pertinent to any issue here. [61]

Mr. Brett: He has stated he considered the whole series of litigation involved in this matter, and a moment ago he said, "Do you mean the earlier case involving the trust patent?" I want to know whether he considered that as well in fixing this fee.

The Court: You may answer.

The Witness: If you and I are together on what you mean, Mr. Brett, by your word "consider,"

(Testimony of L. R. Martineau, Jr.)

naturally, I considered everything which I thought had a fair bearing on the establishment of the reasonable fee, but whether I selected it as one of the factors which should determine the amount of that fee in my judgment is quite another matter.

I was familiar with the Sainte Marie case long before Judge Preston ever called me into the Lee Arenas case, as I try to keep familiar with Supreme Court decisions on Indian and other matters. I had considered that case long before I ever knew Judge Preston had anything to do with this case.

If you mean by your question, did I use it as a factor in determining the specific amounts that I fixed in this proceeding here this morning, the answer is no.

Q. (By Mr. Brett): That answers that. Now, then, Mr. Martineau, one of the factors that you did consider in arriving at an opinion that these attorneys were entitled to at least \$30,000.00 and up to \$75,000.00 as a reasonable fee, was the legal problem that existed at the time they accepted [62] the employment from Eleuteria Brown Arenas to enforce her right to a trust patent; is that not correct? A. Yes.

Q. You knew that that proceeding was filed in January, 1947?

A. I knew the proceeding was filed on the 9th of January, 1947, as stated in the hypothetical question.

Q. You also knew, from your familiarity with the previous decision of the United States Supreme

(Testimony of L. R. Martineau, Jr.)

Court in *Arenas v. U. S.*, which is reported in 322 U. S., at page 419, that on pages 425 and 426 of that opinion the United States Supreme Court had determined that by an act of 1917 the Secretary of the Interior was mandatorily required to give and issue trust patents in severalty to every member of the Palm Springs Band of Mission Indians, provided he could show that he was a member of that band and provided that a selection was made according to law; is that not correct?

Mr. Preston: May it please the Court, I think that is an improper question. It assumes facts not in evidence. It misapplies the facts as I know them to be true, and is in no wise an element of this witness' opinion, as I understand it, but is another move by counsel in his effort to becloud the issue here. I want to tell him that the decision declaring that it was mandatory upon the Secretary of the Interior to make allotments was rendered in 1944. That is over six years [63] ago.

They not only didn't obey that opinion at that time or at any other time, but it was necessary for me, and I did go to the District of Columbia and file a mandamus proceeding against the Secretary of the Interior to make him make these allotments.

The allotments are only slovenly made now, and they are not half through, and there are two actions pending here, one in particular, to correct the inequities and contradictions and unlawful acts of the Secretary already committed with reference to the allotments that are not unfinished, and we are getting nowhere, in my opinion, in estimating the value

(Testimony of L. R. Martineau, Jr.)

of the services here, by cross-examining this witness on the opinion of the Court and what he knew about the opinion of the Court in that case. The Government hasn't obeyed the opinion at any time or place.

Mr. Brett: Your Honor, I don't want to try extraneous matters in this case, and I don't want to attempt to answer Judge Preston now, even though I could. One of the factors the witness would have to consider, and he has admitted he did consider, would be the legal problem that was involved. The legal problem involved, as shown by the pleadings, is whether or not a particular member of the Palm Springs Band of Mission Indians was entitled to a trust patent.

In the hypothetical question, the witness has been asked [64] to fix a value based upon a substantial amount of work which was done in connection with the proceedings, and to fix the value of these particular proceedings.

This question I have just directed to the witness is to show that by a final decision of the Supreme Court of the land—just a minute, please, Judge Preston—at least three years before the complaint in this action was filed, it had been determined that every member of the Band of Mission Indians, Palm Springs Band, who made an adequate selection, was entitled to such a trust patent.

I intend to show, after showing he considered that factor, that he also knew by the pleadings tendered here that there was no issue on that point.

(Testimony of L. R. Martineau, Jr.)

The only issue, sir, was whether or not she was a member of the band and whether or not there had been a selection. I think I am entitled to interrogate him on that.

I don't believe, if the Court please, that one can conscientiously maintain you have to review law and make research to support a point which the Supreme Court has squarely and finally decided. That in itself is complete. That is the purpose of my question.

Mr. Preston: His question is way afield. This witness, as I understand his testimony, only means to state that the knowledge acquired from the research and labor performed in prosecuting the Lee Arenas case was material on hand, [65] equipment for the lawyer when he got ready to start the other case, and it necessarily had some bearing on the value of his services.

Have I characterized it correctly? If not, I wish you would explain that.

If I understand this witness' testimony, he has only given what is known as a mere association connection with the Lee Arenas case as adding an element of value to the services in this case, and not a duplication of services at all. If I understand him rightly, this question is far afield.

The Court: I have been observing here, during the examination of this witness, a lot of inquiries made by counsel on both sides which to my mind have no application here. The Circuit Court of Appeals has sent this case back to this court on a man-

(Testimony of L. R. Martineau, Jr.)

date to determine in dollars and cents what was the value of the petitioners' services in this case. It may involve an inquiry in the main case, which is still pending before Judge Mathes, I understand, to determine that same question, as to what were the services rendered in the main case that went to the Supreme Court to be determined, and if I undertake to determine those elements with this, you are going to have a duplication before Judge Mathes, and you can't escape it.

You can determine that there, as to what services were rendered in the main case where the Supreme Court has held [66] under this act of Congress these allotments must be made to the Indians in that reservation.

Mr. Preston: As I understand this witness, the equipment acquired by the attorneys in prosecuting the Lee Arenas case was material to the prosecution of this case.

The Court: When you go before Judge Mathes and ask him to fix attorneys' fees, and he does it and I do it, you are going to have a duplication.

Mr. Preston: And the first thing Mr. Brett says when you get in the other court is, "You musn't have too much of a fee in this case, because you are getting a fee from the rest of them," and now in this court he says, "You can't get a fee in this court, because you are going to get it in the other."

Mr. Brett: Your Honor, I never made such a statement.

Mr. Preston: You did, and I heard you do it.

(Testimony of L. R. Martineau, Jr.)

The Court: Of course, you are entitled to recover for services in these cases, but we must try to keep them separate and distinct in fixing the amount of the services in each case.

I wanted to fix the attorneys' fees at 12½ per cent of the value, and you were to go and see what the value of the property was and you were going to come back and let the court know what was the value of it, but the Circuit Court of Appeals says, "You must determine in dollars and cents." It seems to me they have got the cart ahead of the horse. [67] That is what I am here this morning for. I am having difficulty in separating this mandate from my own conclusion reached in this case. I tried to protect both sides. I limited it to the services rendered in this particular case, with 12½ per cent of the value. It was to be paid out of the allotment. If the value, when it came back from a trustee which we appointed, was not sufficient, the court could order a hearing on that. There was a duty to do it. But practically it doesn't seem to be working out.

It is justice for these Indian people, to see that they get something more than a bonnet and a pair of gloves out of this.

Mr. Preston: While we have that subject in mind, I want to say to you, of course, it originated with me, but I don't think the Government of the United States ever intends to let the Indians sell a foot of this land. That isn't their intention. That is not why they are fighting here. It is to beat this

(Testimony of L. R. Martineau, Jr.)

down as low as they can get it, in order that the Government itself can absorb the claim. They don't intend to allow this. It would be the darkest blot on the character of the Department of Indian Affairs that was ever known, to let this Indian property sell for the misdeeds of the Commission itself.

The Court: The court is here to protect the Indians, to see that they are not sold for any little, inadequate [68] amount, just enough to pay attorneys' fees. They are entitled to something out of it over and above the expense of these litigations. That is what the court is here for. Congress has conveyed this property in trust to these Indians, and the Government can't take it away from them. It is a question of handling this property and their protection by the Government they are the wards of. That is what the court is here to do, to see justice is done to the attorneys and to them. Let's see if we can't get something that is fair to both sides.

Mr. Preston: Is the court bound by the 12½ per cent?

The Court: No. I might say I don't see how you can get it without selling the property.

Mr. Preston: We want nothing but what is reasonable in this case.

The Court: I know you do.

Mr. Preston: We have contended for nothing else. This is now going onto the eleventh year in this fight that has been on in the courts, and the

(Testimony of L. R. Martineau, Jr.)

Government has dragged its heels in the ground at every turn of the road, just as they are doing today. They have got this witness off on a wild goose chase now.

The Court: We are considering both cases. You injected that in here. You want me to consider it in fixing the attorneys' fees. I tried to fix fees on a value of the [69] allotment, and Judge Mathes tried to do it in the main case. We tried to get at it mathematically to do justice to these Indians and to protect counsel who have rendered services all these years. There is a way to get at it and we will get at it if it takes me a month.

Mr. Brett: I believe, your Honor, the real issue before the court is a ruling upon the Judge's objection to my question, that is, whether or not this man as a part of his consideration considered and knew, at the time these attorneys accepted this employment, that a final decision had been made.

The Court: He may answer that.

The Witness: If the Court please, I would like to state——

The Court: There is too much argument back and forth here.

The Witness: I am a member of the bar, also.

The Court: You must remember he has asked you a question and the court has ruled. He has asked you, Did you consider it? Answer that yes or no.

Read the question to the witness. We are arguing

(Testimony of L. R. Martineau, Jr.)

too much here, that's the trouble. We will never get anywhere.

Mr. Brett: Did you sustain the objection or allow the witness to answer?

The Court: I will allow him to answer.

Mr. Brett: I want him to answer. He can answer yes or no. He doesn't have to argue it. [70]

The Court: We have gone into it on both sides. Go ahead.

The Witness: I don't know what the question is now.

Q. (By Mr. Brett): I will ask you a very simple question. One of the issues presented by the complaint—first, I will show you the original complaint. In determining the reasonable value of the services, you took into consideration the issues which these attorneys presented by their complaint, did you not? A. In this particular action?

Q. In this particular action. A. Yes.

Q. In other words, their employment was to do something specific for a particular client, who was Eleuteria Brown Arenas? A. Correct.

Q. And in order to determine what they were to do, you read the complaint? A. Correct.

Q. The first part of the complaint was a petition that the court determine that the Indian was entitled to a trust patent as to certain lands of the Palm Springs Reservation? A. Correct.

Q. On that point, did you not assume and consider that whether it were these counsel or whether it were Joe Doaks, who was authorized to practice

(Testimony of L. R. Martineau, Jr.)

law, he could have gone to 322 [71] U.S., page 419, and have determined that in 1944, three years before he was employed, the Supreme Court had affirmatively decided, if she was a member of the tribe and if a selection was properly made, that she was entitled to a trust patent?

A. The answer is no.

The Court: Go ahead. That is an answer.

Will we finish before the recess?

Mr. Brett: No.

The Court: Then we will recess until 2:00 o'clock, now.

I will state to counsel the courtroom will be used for some other proceedings during the noon hour, and if they are not through, we will have to wait until they get through.

(Whereupon a recess was taken until 2:00 p.m. of the same day.) [72]

Monday, November 27, 1950—2:00 P.M.

The Court: Call your witness and proceed.

Mr. Brett: Mr. Martineau.

L. R. MARTINEAU, JR.

called as a witness by and on behalf of the petitioners, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Brett:

Q. Mr. Martineau, that reference was to 322 U.S., in place of 320.

Mr. Preston: But he has already answered it.

Q. (By Mr. Brett): Mr. Martineau, had you discussed with Judge Preston the memorandum which he has prepared and submitted to the court, entitled "Memorandum re Attorneys' Fees"?

A. No. I had read it, but not discussed it with him.

Q. In the memorandum, on page 5, he quoted from a decision in *Sampsell v. Monel*, 162 Federal 2d, at page 6.

Mr. Preston: That is not in the hypothetical question, is it?

Mr. Brett: Your Honor, I can't continue the examination of the witness if I can't finish a question without interruption.

The Court: Go ahead. [73]

Mr. Preston: He is cross-examining my witness about the brief I filed. That is not the hypothetical question. I filed a brief here and furnished counsel a copy of it, and now he is cross-examining this witness about that brief. That is not proper cross-

(Testimony of L. R. Martineau, Jr.)

examination. I put this witness on the stand and propounded a hypothetical question to him. That is all there is before the court.

Mr. Brett: I am sorry, your Honor, I can't conduct the examination if I can't finish a question. I ask the court's protection and I will explain this. I want to show Judge Preston has shown various elements to be considered, and I want to ask the witness if those are the elements he considered.

The Court: Go ahead.

Mr. Preston: That has nothing to do with my brief.

Q. (By Mr. Brett): There are stated the following matters as consideration in fixing attorney fees: One, the time which is fairly and properly used in dealing with the case, because this represents the amount of work necessary.

Did you give consideration to that factor?

A. I did.

Q. On that factor, Mr. Martineau, would it not be necessary for you to consider these matters: One, what the lawyer was presented with in the way of a problem at the time that the client first came to him? [74]

Mr. Preston: I object to that as not proper cross-examination.

The Court: Overruled.

Q. (By Mr. Brett): What would be your answer?

A. Would you read the question, please?

(Testimony of L. R. Martineau, Jr.)

(The question was read by the reporter.)

The Witness: I am unable to answer the question because the question is confined to that factor, to wit, "time."

Q. (By Mr. Brett): Mr. Martineau, let's put it this way. If you were going to use as one of the factors which you would consider in determining and giving your opinion as to the compensation that the attorneys were reasonably entitled to for the time given, wouldn't it necessarily require you to consider what the problem was that they were faced with when the client first came in? In other words, what you were going to do for the client?

A. Maybe I could answer it this way, by saying, obviously, the problem presented to the lawyer would consume greater or less time, but that, as I understand the allusion to the case you are reading, that factor, as you call it, is the amount of time spent by the lawyer on the particular case.

Q. Let's put it this way. Wouldn't that amount of time spent in research, in preparation of the pleadings, in getting ready for trial, depend upon the issue that his client presented that he wanted to have enforced or protected? [75]

A. It might depend upon that and on other matters.

Q. Well, then, that is one of the matters.

A. That's right.

Q. Now, then, in this case, at the time that Mrs. Arenas came in to these lawyers in connection with

(Testimony of L. R. Martineau, Jr.)

this particular case, the problem presented there was in three parts: One, her right to receive a trust patent in severalty out of the Palm Springs lands.

That was one, wasn't it? A. Yes.

Q. Two, whether or not she had complied with the law in order to get that. That would be the second? A. Yes.

Q. And, third, in her particular situation, whether or not someone authorized to act in her behalf, because she was a minor, had so acted?

A. Yes.

Q. Now, as to the first point of these three, is it not a fact that, irrespective of whether it was these three lawyers or any other lawyer qualified to practice to whom Mrs. Brown or Mrs. Arenas had come to, that the matter of her right as a member of the Palm Springs Band to receive a trust patent had been finally and completely settled by the Supreme Court in the Arenas decision in 322 U.S. at 419?

Mr. Preston: Just a minute. To which we object on the ground it is not proper cross-examination. It assumes that [76] the case of Eleuteria Brown Arenas was not considered until after the decision in the Supreme Court came down, which is not true. The case was in the hands of these attorneys from the beginning of 1940 and was in their charge all the time, pending the Lee Arenas case in the courts, and it remained with them, and all that was done after the decision was to start the suit, and that was done in 1947.

Now, it is not fair to ask him to start in in 1947.

(Testimony of L. R. Martineau, Jr.)

You have got to start in in 1940. That is when the case started.

Mr. Brett: Now, if the Court please, I always dislike to have to dispute with counsel a matter which is a matter of record, but I direct your attention to Exhibit 8, which has been received today as the first exhibit for the petitioners, if the clerk will hand it to you. I direct your attention to page 180, and 181, in which there is recited the contract with Mrs. Arenas, and I direct your particular attention to the fact that it is executed and acknowledged on December 9, 1944, which is subsequent to the date of the decision in the Arenas case.

Mr. Preston: Yes.

Mr. Brett: And, therefore, it would be an impossibility, if the Court please, for the condition which Judge Preston has previously described to exist, to wit, that their contract was in existence before the Supreme Court decision was made, because the very record they introduced, which was received [77] twice in this case, as Exhibit 2 and Exhibit 6, is dated subsequent to the date of that case.

Mr. Preston: Your Honor, we have repeatedly said in your presence here that Mr. Sallee, who is sitting here, and Mr. Clark, took the case of Eleuteria Brown in 1940. They didn't start the suit, it is true, but they had the case. She was a member of the family, and by special verbal arrangement that was the understanding, that she should follow

(Testimony of L. R. Martineau, Jr.)

the test case, whichever way it went. If it should prevail, why, her suit would follow. If they lost, there would be no use of starting her suit.

That contract of October 10, 1940, in the record, shows that he was to take care of the family. I will find it here.

Mr. Brett: I think I can direct Judge Preston's attention to page 164.

Mr. Preston: No. Page 93 is what I am reading it from here. It starts on page 89. Here it is:

"It shall be the duty of said attorney"—that is Mr. Sallee, who took the case originally—"to advise the said party of first part and to represent him before all courts, departments, tribunals, and other officers and commissions having any duty to perform in connection with said investigation, consideration, and final settlement of his said claims, and any and all matters that may be necessary in the opinion [78] of the said attorney at law, party of the second part, and in the final settlement of any and all claims and matters pertaining to said allotment to said party of the first part, or to any of the ancestors of the party of the first part, and any relative either by law or by marriage, that might become the property of party of the first part by inheritance or otherwise."

These men say that was intended to cover the case of this petitioner, allottee here, before the court. They further testify that the understanding between them at the time was with Lee Arenas that this claim should be looked after by them. That was

(Testimony of L. R. Martineau, Jr.)

in 1940. It was held in abeyance because there was no sense in taking two test cases to the Supreme Court of the United States. The expense of taking one of them was enough.

When we got the decision in 1944, the contract was materialized into a writing, but it always existed between Lee, Arenas, this girl, and them, even in 1940. It is not fair to say that a man in 1947 would know all he had to do was to follow the decision of a court in 1944.

That is further erroneous because the allotment possibly would take a new schedule, and we couldn't get it out of them except by force later. So, you see, it is just simply killing time here, beclouding the issue, and not furthering this investigation at all.

The Court: The objection is sustained. Go [79] ahead.

Mr. Brett: If your Honor please, I realize your Honor has ruled, but, for the purpose of the record only, may I make a brief statement, so that it will appear in the record?

The Court: Yes.

Mr. Brett: The contract which Judge Preston has just referred to, the one of 1940, was the one which was conditioned upon approval of the Secretary of the Interior, and the one Judge Mathes has finally held—and that was not reversed—was void.

Mr. Preston: That is not true.

Mr. Brett: The only contract that was held valid

(Testimony of L. R. Martineau, Jr.)

by Judge Mathes was the one in 1944 for quantum meruit.

Mr. Preston: If your Honor please, allow me to interrupt and say there isn't a word of truth in that. He held Clark and Sallee were bound by the contract of 1940.

The Court: Let's try to get the facts out first. You are trying to argue the case as you go along. I understand it. Go ahead.

Q. (By Mr. Brett): Tell me briefly, in your own words, your opinion of the problem that was presented to Judge Preston and his associates when they were employed by Mrs. Brown in December of 1944, what issue of law and what issue of fact they were required to prepare themselves on.

Mr. Preston: I object to that upon the ground the employment did not originate in 1944. It originated in 1940. [80]

The Court: The court is constantly up against your disagreeing on what date this contract was consummated and was in existence, before or after the Supreme Court decided what we call **the main** issue.

Mr. Brett: Your Honor may assume, from an examination of the file in the other case—Pardon me for interrupting. I shouldn't have said that. But I would like to send for the file in that case and show you where Judge Mathes expressly found that contract was void.

Mr. Preston: He said it was not binding on the Government, but it is binding on the attorneys, and

(Testimony of L. R. Martineau, Jr.)

the attorneys were held to the 10 per cent mentioned in that contract.

Mr. Brett: I will approach my question in this way——

Mr. Preston: You better approach it in the right way.

The Court: Let's get through with this case. Get down to the facts.

Q. (By Mr. Brett): Mr. Martineau, did you assume, in fixing the value which you gave this morning, that these attorneys were obligated to re-try for Mrs. Brown or Mrs. Arenas the same issue which had been tried in the Lee Arenas case de novo, as if no decision had been made on the matter of the mandatory duty of the Secretary of the Interior to issue trust patents?

A. No, I did not so assume.

Q. Did you assume, then, that when they accepted this [81] employment, that that particular matter had been finally determined by the Supreme Court, and that insofar as that issue was concerned, all that they or any other counsel would have to do would be to cite the decision of the Supreme Court?

Mr. Preston: To which we object on the ground it is not proper cross-examination, assuming facts not in evidence, and in contradiction of the facts in the record.

The Court: Sustained. I am trying my best to keep these two cases separate, the one pending before Judge Mathes and the one pending before me, but I am having a difficult time doing it. If you

(Testimony of L. R. Martineau, Jr.)

don't do that, you are going to have a duplication of attorneys' fees, that is what you are going to have. So go ahead. You understand the court's ruling, both of you.

Mr. Brett: If you are prepared to rule that you are going to exclude consideration of the work that they did on the original case, I have no further examination on that phase, but if you are not so prepared to rule and a substantial part of the fees is to be on those services, then I want to show that wasn't necessary to be considered in this case.

The Court: You do so.

Q. (By Mr. Brett): The second point you have referred to was the matter of whether or not the plaintiff in this case, Eleuteria Brown Arenas, was an adopted daughter of Lee Arenas. [82]

Mr. Preston: To which we object on the ground it is not proper cross-examination. It is in violence to the hypothetical question.

The Court: Overruled.

Mr. Preston: Whether she was adopted or not adopted has nothing to do with the case.

The Court: Overruled.

The Witness: Will you please read the question, Mr. Reporter?

(The question was read by the reporter.)

Q. (By Mr. Brett): Didn't you understand that was the second issue the attorneys were confronted with?

(Testimony of L. R. Martineau, Jr.)

A. Yes, but your question said I was compelled to consider——

Q. I will withdraw the question to save time.

I am asking you about the matters you considered as far as their efforts were concerned.

A. Yes.

Q. The second issue that the attorneys were confronted with would be the question of fact and law as to whether or not the plaintiff in this case, Mrs. Arenas, had been adopted by Lee Arenas. You understood that to be in the complaint?

A. That's right.

Q. Did you understand that anything they had done, regardless of its nature—— [83]

A. Who?

Q. The three petitioning attorneys—any work that they had done whatsoever in connection with the Lee Arenas case, either in trying it, filing briefs, or anything else, tended in any way whatsoever to assist them in establishing that point, either factually or in law?

A. I confess I am unable to answer the question because I don't understand it.

Q. I will try to spell it out a little bit. You do recall in the complaint in this case, this present case, Mrs. Brown pleaded she was entitled to a trust patent because she was the adopted daughter of Lee Arenas and had had a selection made for her. You remember that, don't you? A. Yes.

Q. That was an issue, then, that these attorneys were confronted with in the way of proof?

(Testimony of L. R. Martineau, Jr.)

A. Yes.

Q. That would necessarily involve two types of preparation. One would be facts, acts, documents, et cetera; is that not correct? A. Yes.

Q. And the other would be law? A. Yes.

Q. Now, then, the question I am asking, and I am referring, sir, again to your considerations of the services [84] that they rendered in the Lee Arenas case, all of them, is: Was there any portion of that service in any part of the files, in any part of the pleadings, in any part of the briefs, or in any part of the research which you learned they did, that would have aided them one way or the other in presenting that point in the case, that is, whether or not Mrs. Brown or Mrs. Arenas was the adopted daughter of Lee Arenas?

Mr. Preston: To which we object on the ground it is self-evident nothing in the Lee Arenas case would throw any light on the adoption.

The Court: He is asking him, did he consider it. He can say yes or no.

Mr. Preston: Then the answer would be no.

The Witness: The question involves more, your Honor, than as stated. I would like to have the first portion of it read. Well, read all of it.

The Court: You may read it.

(The question was read by the reporter.)

The Witness: I am unable to answer what they considered.

Q. (By Mr. Brett): In other words, you don't

(Testimony of L. R. Martineau, Jr.)

know, then, whether or not anything they did——

The Court: He says he is unable to answer.

Mr. Brett: I think that is correct.

Q. Now, then, as to the next matter, the third consideration was whether or not anyone with authority had made [85] a selection for this minor, that was the third point involved in this case; is that not correct?

A. That is the way you stated it, yes.

Q. You are aware of the fact that at the time the selections were made she was a minor?

A. I am.

Q. I will repeat in part the question I asked before. In any part of the work which they did in connection with the Lee Arenas case, the trial, the briefs, the research, or anything involved in that case which you have learned that they did, is it your opinion that any part of that would have assisted at all on the matter of making proof of the fact and sustaining the law as to whether or not anyone had legal authority to make a selection for this child?

A. I could answer that question, but it would be a dissertation on the fact that anything a man learns from the time he is a baby down to date has a bearing on what he considers or what he thinks.

Now, if you are asking a specific question about the use, for instance, that I made of taking a course in contracts when I was in law school, that affects my everyday work, and so in torts, and so in every-

(Testimony of L. R. Martineau, Jr.)

thing else, and so as to all of the other cases which I have had involving legal problems.

So long as I differentiate between clients so that I do not charge clients for my education and so that their [86] individual problem is handled fairly and on a reasonable basis, I am entitled to whatever I may know about whatever subject.

That doesn't answer your question yes or no. I regret that I can't answer it in the way you phrase it.

Q. Well, you do know, Mr. Martineau, that there was no issue involved in the Lee Arenas case, in any part of the various trials, that concerned a selection for an orphan or minor child, don't you?

A. I am aware of that, yes.

Q. Just so that we will have the record clear, your opinion of value of services in this case doesn't include all of the various litigation that Judge Preston has detailed that he has performed for various clients throughout his career, does it?

A. Certainly not, except as they go to his qualifications.

Q. Now, Mr. Martineau, we have first reached the stage where they had to prepare their pleadings. The next stage they would be confronted with would be when pleadings were joined and issues were joined; isn't that right?

A. Ordinarily, that would be correct.

Q. In this case, you learned that as far as the issues were concerned, the only issues that were joined were whether or not Mrs. Arenas was an adopted daughter of Lee Arenas, and [87] whether

(Testimony of L. R. Martineau, Jr.)

or not anyone had the legal right to make selections for her?

A. I did not so assume that that was the only issue that might be involved in the lawsuit.

Q. What other issue did you believe was involved in the lawsuit at the time it came up for trial?

A. Are you talking about the time it came to trial or the time of the employment, or the time of the 1944 contract?

Q. I am talking about the time when issue was joined in this present case, 6221, the complaint had been filed and an answer had been filed by the respondent.

A. That's right.

Q. I will repeat my question. Did you not learn, then, from your examination of the pleadings, that the issues left to be determined and to be established were, one, whether or not this plaintiff, Mrs. Arenas, was the adopted daughter of Lee Arenas, and, two, whether or not, if she were not so adopted, anyone did have the legal authority to select the lands in her behalf?

That all other matters were conceded by the pleadings as being in her favor?

Did you not so find, that those were the pleadings?

A. I think those issues were in the pleadings, but whether or not any concessions were made subsequently by stipulation or communication with the court or otherwise, I [88] don't know.

Q. I am not referring to that. I am referring

(Testimony of L. R. Martineau, Jr.)

to the answer. You are familiar with the elementary principle that where an answer is filed and it admits allegations in the complaint, the plaintiff no longer has to prove those issues, aren't you?

A. I would assume that I am familiar with that, yes.

Q. Did you not discover in the pleadings in this case that the answer admitted all of the allegations of the complaint except the two factors I have mentioned?

A. Yes. I admit those were the two primary factors that were left.

Q. What other factor was there left——

Mr. Preston: Object to that. Oh, go ahead. Excuse me.

Mr. Brett: Are you through?

Mr. Preston: Go ahead.

Q. (By Mr. Brett): What other factor did you consider was left as an issue to be tried?

Mr. Preston: To which we object upon the ground that the documents are the best evidence.

The Court: Overruled.

The Witness: I am unable to answer that question, Mr. Brett, for the reason I realize from long experience at the outset of a case the joinder of issues on a complaint or declaration, on the one hand, and an answer, on the other, [89] may not preclude other matters that develop during the course of the trial. What did develop during the course of this trial may have affected the amount of work these men did.

(Testimony of L. R. Martineau, Jr.)

Q. (By Mr. Brett): You have read, as you stated this morning, the reporter's transcript of the proceedings? A. That is true.

Q. Did you ascertain therefrom that any issues developed other than the issue of the adoption by Lee Arenas of the plaintiff, Mrs. Arenas, and the issue as to whether or not, if she were not adopted, the Special Allotting Agent Wadsworth, who had made the selections for her, had authority to make such selections? A. Not that I recall.

Q. I believe you have stated that, as to that particular issue, you concede that the work done in connection with the Lee Arenas case would have had no bearing one way or the other?

A. I do not so concede, because I believe, in taking that case, if it had been taken by three other lawyers, other than the three petitioners here, they would have had to consider the state of the law on the subject, so it does in that respect have some effect. Your question, if it is broad enough to mean that, Mr. Brett, I can't concede anything of that sort.

Q. Let's take the next step. We have had the trial. [90] There was a judgment rendered in favor of this particular plaintiff, that she have the trust patents as prayed. There was an appeal taken by the United States, and within one week thereafter the appeal was dismissed.

You are familiar with federal practice, aren't you, Mr. Martineau?

(Testimony of L. R. Martineau, Jr.)

A. I have been in the federal courts often enough, and I think I am.

Q. In your opinion, would there be any amount of work that would be required of competent counsel during the one-week period after the filing of a notice of appeal, before any designation of record was made, before any designation of points on appeal was made, before any action whatever was taken except the filing of the general notice of appeal, during the first week thereafter?

A. There might have been a week's work, but other than that there couldn't be, Mr. Brett.

Q. Would it be possible in your opinion for the attorney in connection with his employment, who was going to resist that appeal, to do very much affirmatively in that regard until he first knew what the basis of the appeal was, what part of the record was going to be taken up, and what points were going to be made?

A. He certainly could, if he is a thoroughgoing lawyer. Any time there is a threat of an appeal, any competent lawyer, [91] in my opinion, undertakes to get his record in shape.

Q. How long a time do you believe would have been reasonably required during that week, of competent counsel?

A. I said not in excess of a week's time.

Q. In other words, you believe that they——

A. Under your assumption of facts, Mr. Brett, of a week having elapsed, I would just assume the

(Testimony of L. R. Martineau, Jr.)

most he could put in would have been a week's work.

Q. But do you believe any competent counsel would have had to put in a week's work?

A. I know very well I would have, if it had been my case. But whether I am competent is another question. I believe I am.

Q. One of the elements which is required in this opinion is the skill employed in meeting the situation. That was one of the matters you considered, wasn't it?

A. Yes.

Q. At the time that we proceeded to trial, the two issues were the matter of adoption by Lee Arenas and the matter of whether Wadsworth had any authority to make a selection. Did you determine that there had been any depositions taken or any request made—first, any depositions taken of any representative of the Government, to establish whether there was any record to support the claim that Wadsworth had such authority? [92]

A. I have not seen any such deposition.

Q. You have assumed that no such deposition was taken?

A. I have assumed the facts set forth in the original hypothetical question. I do not believe it is there mentioned.

Q. Did you assume that any request for admissions of any kind or character was made to the respondents in the case with respect to the authority of Wadsworth to make the selection in behalf of this minor?

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: To which we object upon the ground that the question states the facts that were to be assumed.

Mr. Brett: I don't think so. The question is general. It says they consumed a certain number of days.

The Court: Overruled.

The Witness: Not unless those facts appear in the hypothetical question propounded by Judge Preston.

Q. (By Mr. Brett): You did learn, did you not, that during the course of the trial no such evidence was submitted to the court? By "such evidence" I mean there was no writing submitted to the court showing that Wadsworth had any such authority.

A. Yes.

Q. And you did learn, also, that the first time that such information was submitted was subsequent to the trial and the submission of the cause to Judge Cavanah? [93]

A. Yes.

Q. In your opinion, would you say that a circumstance of that character showed exceptional or average skill in the preparation of such issue?

Mr. Preston: If you had those letters, you would have put them out, I should think. Maybe you are sitting on them. We found the letter that disclosed the authority after the case was submitted, and the letter came from the possession of the Government.

Mr. Brett: Your Honor, I don't choose to answer comments. I am asking the witness a question.

(Testimony of L. R. Martineau, Jr.)

I think it is a proper question and I would like to have it answered.

The Court: Go ahead. Answer the question.

Read the question.

(Question read by the reporter.)

The Witness: I don't understand that question.

Q. (By Mr. Brett): Let me ask you another and we will get through.

You are familiar, you say, with federal practice, and that would include equity practice?

A. Very familiar for a great many years.

Q. And this you knew to be an equity case?

A. Yes.

Q. Isn't it just elementary in the preparation of an equity case, if the material which you want is in the hands [94] of your adversary, or you believe it is, to either take the deposition of your adversary or to make request for admissions from your adversary?

A. That in my opinion is not elementary, but a matter of judgment of counsel who has the case in hand.

Q. With reference to the value of these services, the hypothetical question has assumed a valuation of \$300,000.00. I will ask you, Mr. Martineau, if this honorable court should rule in line with the opinion of the Court of Appeals that the value of the property is to be the value of the Indian's interest, which is a trust patent, and assuming that the testimony should show that the valuation of

(Testimony of L. R. Martineau, Jr.)

such interest would be \$41,000.00, what would be your opinion? Assuming all the other factors of Judge Preston's hypothetical question, what would be the reasonable value of the services performed by these petitioners?

A. Disregarding the fact that you say the hypothetical question propounded to me by Judge Preston mentioned only \$300,000.00, because it mentioned \$300,000.00, \$200,000.00, and \$100,000.00, you are now asking me to assume that it has been adjudicated, or may hereafter be adjudicated, that the total value of the interest of Eleuteria Arenas is of the market value of \$41,000.00?

Q. That is correct, yes.

A. And asking me what in my judgment a reasonable fee [95] would be under such circumstances?

Q. Yes, sir.

A. I think a reasonable fee under such circumstances would be \$20,000.00.

Q. Assuming that the court should find that the reasonable value of the Indian's interest, trust patent interest, was \$30,000.00, what would be your opinion as to the reasonable value of the services of these attorneys?

A. I believe that as you decrease the amount of the value of the interest, where the services are rendered entirely on a contingent basis and the attorneys have to carry the load, that the smaller the amount involved, the larger in proportion is the attorneys' fee. In this instance, and under your assumption of a \$30,000.00 valuation instead of

(Testimony of L. R. Martineau, Jr.)

\$41,000.00, which you took in your preceding question, I would say that any figure between \$20,000.00 and \$25,000.00 might cover the amount of work done upon a reasonable basis.

Q. Have you assumed that the services rendered in this case were on a contingent basis?

A. I understood so, yes.

Q. Did you not read in the record that this plaintiff had signed a written contract to pay on a quantum meruit basis?

Mr. Preston: Your Honor, that is a contingent contract, if you will read it. [96]

Mr. Brett: I think the question should be answered, your Honor.

The Court: Read the question.

The Witness: Re-read the question, will you, please?

(Question read by the reporter.)

The Witness: I read the various contracts which appear in the record, Mr. Brett. I don't know at the moment to which one you refer.

Q. (By Mr. Brett): Well, Mr. Martineau, I am going to show you a copy of the printed transcript on appeal in Case No. 12218. I believe you have a copy. A. I do. What is the page?

Q. The document is the same document which has been received in evidence in this case as Petitioners' Exhibit 8. I refer you to page 180 and page 181.

Do you find on those pages a transcription of the

(Testimony of L. R. Martineau, Jr.)

contract dated December 9, 1944, signed by Della Brown, also known as Eleuteria Brown Arenas?

A. I do.

Q. I will ask you to read that, if you will, and state for the record any portion of that in which it is stated that the compensation of these counsel is to be contingent.

A. I think the word "contingent" does not appear in that contract.

Q. As an experienced lawyer, would you say that that [97] contract could be construed as a contingent contract?

Mr. Preston: Objected to as a question of law for the court to determine.

The Court: Sustained.

Q. (By Mr. Brett): Now, Mr. Martineau, one other question, and I believe I am going to be finished. I ask you to examine page 93—I believe it begins on page 89 of the same document, which is a contract between David D. Sallee and Lee Arenas, and which, although I dispute it, Judge Preston has stated was a contract on behalf of this plaintiff, Eleuteria Brown Arenas. I will ask you to examine that contract, which appears on page 89 and ends on page 96, and ask you whether or not that contract is on a contingent basis?

Mr. Preston: To which we make the same objection, your Honor. It is argumentative. The contract is before the court.

The Court: Sustained.

Q. (By Mr. Brett): Did you, in giving the

(Testimony of L. R. Martineau, Jr.)

opinion which you expressed earlier of various values, ranging from \$75,000.00 down to \$30,000.00, assume that there were any contracts in existence between the plaintiff and these petitioning attorneys, Preston, Clark, and Sallee, which are not transcribed in the transcript of the record?

A. No.

Q. In case 12218? [98]

Mr. Preston: What was the answer? Was it "No"?

Will you read that answer?

(The answer was read by the reporter.)

Mr. Brett: That concludes my cross-examination.

Mr. Preston: One or two question, your Honor, on redirect.

Redirect Examination

By Mr. Preston:

Q. Did you answer the question as to what your figures would be if reference to the Lee Arenas case was stricken from the hypothetical question?

A. Do you mean the part which you and Mr. Brett excluded?

Q. Yes.

A. Which appears on my copy of the hypothetical question at page 4, commencing line 31, with the word "Thereafter," and continues to the end of the paragraph, which is on page 5, line 4.

(Testimony of L. R. Martineau, Jr.)

Q. Would your answer be any different if that were deleted? A. No.

Q. The minutes of the court show that this cause was called in another department for trial and was transferred out to this department, which consumed part of two days. Would that situation make any difference in your figures? [99] A. No.

Q. What phase or phases of the Lee Arenas case did you consider in estimating the fees that should be allowed the petitioners in the present case? What was the relation?

A. None whatsoever, except as they had a bearing on what lawyers who are familiar with the subject call Indian law.

Q. If some third person had been called in to the present case, the Eleuteria Brown Arenas case, if a new lawyer, who had not familiarized himself with the Lee Arenas case, had been called in, he would have had to use his own research, would he not, to prepare for this case?

A. Yes, he should.

Q. Is that what you mean by the relationship between the cases?

A. That is what I meant by the consideration of law as distinguished from the factors that the courts have said should enter into a reasonable fee.

Q. Is that all the explanation you care to make of the reason you make the statement you do?

A. Yes, Judge Preston, for the reason that if, instead of employing Mr. Sallee, Mr. Clark, and you, this plaintiff, original plaintiff, had sought the

(Testimony of L. R. Martineau, Jr.)

aid of A, B, and C as attorneys, a very substantial amount of work would have had to be done by A, B, and C to get abreast of what you had learned in the other case, but none of the work for which you [100] were paid in the Lee Arenas case should be again paid for in this case.

Q. In other words, the know-how is of some value? A. Yes.

Mr. Preston: That's all.

Mr. Brett: May I ask two questions, and I promise that will be all?

The Court: Be sure it is just two.

Recross-Examination

By Mr. Brett:

Q. Now, Mr. Martineau, is it not a fact that upon the issue of whether or not a member of the Palm Springs Band of Mission Indians was entitled to a trust patent in severalty, a lawyer could get his complete answer by referring to Title 25, Section 345, of the United States Code, and the decision of the Supreme Court of the United States in *Arenas v U. S.*, in 322 U.S., wherever that opinion appears in 322 U.S.?

Mr. Preston: To which we object that it is argumentative, a question of law, and not a matter for cross-examination.

The Court: Sustained.

Mr. Brett: No further questions.

Mr. Preston: Thank you very much. That's all. This witness would like to be excused.

The Court: You are excused.

(Witness excused.) [101]

Mr. Preston: I would like to have the record show that the original Eleuteria Brown action for the adjudication of her right to an allotment came up for hearing on the 16th day of March, 1948, and came on for trial and was ordered continued to the 23rd day of March, 1948, at 10:00 o'clock, and then transferred to Judge Cavanah for trial. That is 3-23-48. It came up first 3-16. When it got over here it was 3-23. So there was a part of two days, and I suppose that is the way the two-day feature got in the case.

Mr. Brett: There is no objection.

The Court: If there is no objection, it may be admitted.

Mr. Preston: Your Honor, we have one valuation witness that was tied up as a witness in another court and can't be here this afternoon, I regret to say. Your Honor will recall the record now is that the testimony of Benton Beckley is in the transcript now before you in which he fixed the value of this property at \$300,000.00.

There is the testimony of two government witnesses that fixed very much smaller amounts. I understand counsel wants to further cross-examine Mr. Beckley, and I would be appreciative if he would engage the rest of the afternoon session in that feature, if he would like to do so at this time.

Is that all right?

(Testimony of C. H. Perdeu.)

Mr. Brett: I want to interrogate another witness briefly first, if I may. [102]

Mr. Preston: That's all right. Is it germane to this issue? Maybe we can stipulate.

Mr. Brett: May I consult with Judge Preston just a moment, your Honor?

The Court: Yes, you may do so.

(Short interruption.)

Mr. Brett: I am willing to proceed out of order until Judge Preston has his next witness.

The Court: Have you any other witness besides the one you are waiting for?

Mr. Preston: That is the only one I can think of at the present time.

The Court: You may proceed then out of order. Go ahead.

Mr. Brett: Mr. Perdeu.

C. H. PERDEW

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: C. H. Perdeu.

Direct Examination

By Mr. Brett:

Q. What is your official position, Mr. Perdeu?

A. District Agent.

Q. Of what? [103]

(Testimony of C. H. Perdew.)

A. Of the Sacramento Area District.

Mr. Preston: You will have to talk louder, or else I won't get you.

The Witness: District Agent of the Sacramento Area Agency Office, California Indian Agency.

Q. (By Mr. Brett): Does that include the Indian Reservation known as the Palm Springs Reservation? A. Yes, it does.

Q. And in connection with your official duties, do you reside upon that reservation?

A. Yes, sir.

Q. For how long have you resided there?

A. Nearly six years.

Q. In connection with that residence and in connection with your duties, have you become familiar with the streets and the locations thereof that exist in the Palm Springs area adjacent to the Palm Springs Reservation? A. Pretty well, yes.

Q. Are you personally familiar with the locations of the three properties on which trust patents have been issued pursuant to the judgment of this court in this proceeding to the plaintiff Eleuteria Brown Arenas? A. Yes, sir.

Mr. Brett: Would you mark this as the government's exhibit or respondent's exhibit, whichever it is? [104]

The Clerk: Respondent's Exhibit A for identification.

(The document referred to was marked Respondent's Exhibit A for identification.)

(Testimony of C. H. Perdew.)

Mr. Brett: And will you please mark this as Respondent's Exhibit B for identification, this drawing.

(The drawing referred to was marked Respondent's Exhibit B for identification.)

Mr. Brett: May the record show, Judge Preston, that counsel for the respondent has exhibited Exhibits A and B for identification to you?

Mr. Preston: Yes. I would like to have copies of them, though. Do you want to offer them in evidence now?

Mr. Brett: No.

Q. Mr. Perdew, you have seen this drawing, which has been marked as Respondent's Exhibit A for identification, have you? A. Yes, sir.

Q. And upon that drawing is the two-acre parcel which has been allotted to Mrs. Arenas shown?

A. Yes.

Q. And how is it designated?

A. Lot 50, Lot No. 50.

Q. Is there a color designation?

A. Pink or red, whatever it is.

Q. With reference to the properties surrounding that [105] two-acre parcel on all sides, does the drawing show other allotted properties?

A. Yes.

Q. First, with reference to the area which borders the two-acre allotment on the north, what does the drawing disclose? A. Lot 47.

Q. And is that allotted under a trust patent in

(Testimony of C. H. Perdew.)

severalty to some other member of the Palm Springs Band? A. Yes.

Q. And what other member?

A. It is one of the Andreas children. I don't see the name on there.

Q. Virginia Anne Milanovich, isn't that the allotment? A. Yes, Virginia Anne.

Mr. Preston: The Lee Arenas adjoin that, don't they?

Mr. Brett: That isn't on here.

Mr. Preston: It should be on here, 46 and 47. Where are they?

Mr. Brett: Just a minute, Judge, please.

Q. Your answer is on the north the allotment of a two-acre parcel is shown in blue by the number 47, lot 47, and that is allotted to Virginia Anne Milanovich, a minor? A. Yes.

Q. And she is receiving an allotment trust patent of [106] that area? A. Yes, sir.

Q. Let's take the east of the property. Has the property which borders the two-acre parcel allotted to Mrs. Arenas on the east been allotted in severalty? A. Yes.

Q. To whom has it been allotted?

A. That is No. 42. That was allotted to one of the Andreas children.

Q. One of the Andreas, A-n-d-r-e-a-s?

A. Yes, sir.

Q. Let's go to the south of this property. What lot appears to the south of it? A. Lot 51.

Q. Has that property been allotted under a trust

(Testimony of C. H. Perdew.)

patent in severalty to another member of the Band?

A. Yes, it has.

Q. To whom has it been allotted?

A. One of the other Andreas children, John Andreas, I believe it is.

Q. The property to the east of the two-acre parcel, has it been allotted to another member of the Band?

A. Yes, sir.

Q. By a trust patent in severalty?

A. Yes. [107]

Q. How is it designated on the drawing?

A. Lot No. 49.

Q. And in blue? A. In blue.

Q. To whom has it been allotted?

A. Corinne Welmas.

Q. What is the principal business thoroughfare in the city of Palm Springs?

A. Palm Canyon Drive.

Q. Is that shown on the drawing?

A. Yes, sir.

Q. And in what form is it shown on the drawing?

A. That is in blue.

Q. Is there a business street which borders the section 14 in the Palm Springs Reservation?

A. Palm Canyon Drive.

Q. I say which borders Section 14 in the Palm Springs Reservation. Is there any business street which borders it?

A. Only Palm Canyon Drive.

Mr. Preston: Indian Avenue.

The Witness: Indian Avenue. Pardon me.

(Testimony of C. H. Perdew.)

Q. (By Mr. Brett): On which side does Indian Avenue border Section 14?

A. On the west side.

Q. Is it shown on Respondent's Exhibit A [108] for identification?

A. Yes, sir, in green.

Q. There are some other roads shown by name, with just two parallel lines. Are you familiar with the fact that such roads exist, as shown on the drawing?

A. Yes, sir.

Q. Will you enumerate for the record, beginning at the top, the various roads that are so shown and state the direction in which they run?

A. They run east and west. Alejo Road.

Q. Is that A-l-e-j-o?

A. That is the first one.

Q. To the north?

A. The section line, north. The next road south of that is Amado Road. It runs east and west.

The next one shown is Andreas Road, running east and west.

Q. Let me stop you there. Those three roads run here along the boundary line in the north or into the Indian reservation?

A. Yes, sir.

Q. East of Indian Avenue?

A. Yes.

Mr. Preston: Are they a part of 14 or not?

Q. (By Mr. Brett): Those three roads either border on [109] or are in Section 14, is that correct?

A. Yes.

Q. Now, proceed. What is the next road?

A. Arenas Road.

(Testimony of C. H. Perdeu.)

Q. Now, take each road from the top to the bottom of the drawing.

A. Starting at the top, Tahquitz Drive.

Q. Tahquitz Drive runs in what direction?

A. East and west.

Q. Does it go into the reservation?

A. No, sir. It stops at the reservation line.

Q. In other words, it runs west from Indian Avenue and crosses Palm Canyon Drive and then proceeds west into the main town of Palm Springs?

A. That is right.

Q. But does not enter into Section 14 of the reservation? A. No, sir.

Q. What is next?

A. The next street is called the Plaza. That is a short street between Palm Canyon Drive and Indian Avenue, running——

Q. In what direction?

A. East and west between the two streets there.

Q. Does it enter into Section 14 of the [110] reservation? A. No, sir.

Q. The next street?

A. The next street is Andreas Road—Arenas Road, rather, Arenas. That runs through the reservation and then it runs west of Indian Avenue, continues across the city.

Q. It continues west of Indian Avenue and across Palm Canyon Drive? A. Yes.

Q. And runs in an east and west direction?

A. Runs in an east and west direction.

Q. What is the next street?

(Testimony of C. H. Perdew.)

A. The next is Baristo Road, B-a-r-i-s-t-o. That runs into the reservation and it runs west from Indian Avenue across the private-owned land of the city.

Q. You say Baristo Road runs into the reservation?

A. It is not really a road, it is shown on the map, but was never improved. There is a road there or should be, anyway.

Q. And the next road?

A. The next road is Ramon Road, which borders the south line of Section 14, and it runs east and west across Indian Avenue and Palm Canyon to the west, and east along the south line of Section 14.

Q. And then there are shown several roads, in addition to Palm Canyon Drive and Indian Avenue, which run north and [111] south. First, with reference to the east boundary of section 14, what road exists?

A. On the east boundary?

Q. Yes. A. That is Sunrise Way.

Q. And that runs the entire length of Section 14?

A. Yes.

Q. Connecting Alejo Road with Ramon Road?

A. Yes, sir.

Q. Is there any other road through the reservation between Indian Avenue and Sunrise Way running north from Ramon Road to Alejo Road?

A. Yes, sir.

Q. What road is that?

A. Calle Encilia and El Segundo Road.

(Testimony of C. H. Perdew.)

Q. Are there shown here some roads running south of Ramon Road? A. Yes, sir.

Q. And what roads are they?

A. The first one shown is Calle Ajo and Calle Encilia.

Q. Calle Ajo and Calle Encilia?

A. Yes. Santa Rosa, Calle Abroni Aurita.

Q. What is the distance, Mr. Perdew, from the east boundary of Indian Avenue to the most westerly boundary of the two-acre parcel allotted to Mrs. Arenas, and which is shown [112] on the drawing as Lot 50? A. I believe it is 528 feet.

Mr. Brett: I will offer the drawing, if the court please, as Respondent's Exhibit A.

Mr. Preston: May it please the court, I have no particular objection to this as a marker for relative positions, but the Palm Springs Indian lands were officially surveyed, certainly, covering the area involved here. An official plat was made, streets are laid out on it that are not shown in this paper at all, as I understand it, and every lot abuts a method of ingress and egress, a road, and those are left out of this. If I am mistaken, I will apologize, but I don't see them here. In my opinion, this thing would do nothing but mislead the court. What I want to do, if it is admitted, is to be able to furnish the court with an official map showing the true situation.

The Court: You may do so. This may be admitted for what it is worth.

Mr. Preston: For what it is worth. All right.

(Testimony of C. H. Perdew.)

The Clerk: Respondent's Exhibit A in evidence.

(The exhibit referred to was received in evidence and marked Respondent's Exhibit A.)

The Court: I have no official map before me at this time. It has been admitted for what it is worth. What's next?

Q. (By Mr. Brett): Mr. Perdew, I will show you a [113] document which has been marked Respondent's Exhibit B. You have seen this before?

A. Yes, sir.

Q. Does this drawing show the public way known as Palm Canyon Drive?

A. Yes, it does.

Q. And does it also show the two additional allotments in severalty on which trust patents have been issued to Mrs. Arenas, to wit, the five-acre and the 40-acre plots? A. Yes.

Q. How are they shown on the drawing?

A. They are shown in—did you say Mrs. Arenas?

Q. Eleuteria Brown Arenas.

A. They are shown in pink.

Q. With the letter E? A. The letter E.

Q. Is Palm Canyon Drive the principal thoroughfare in the city of Palm Springs?

A. Yes, sir.

Q. Does this drawing show an extension of it southerly adjacent to the five-acre parcel?

A. Yes, sir.

(Testimony of C. H. Perdew.)

Q. I will ask you if the five-acre parcel, with the exception of its frontage on Palm Canyon Drive to the west, is entirely surrounded by lands which are allotted in severalty [114] under trust patent to other members of the Palm Springs tribe?

A. Yes, sir.

Q. Will you state to the court whether the drawing shows the lands which are immediately north of the five-acre tract?

A. That is the five-acre allotment which is the allotment of the heirs of Guadalupe Arenas.

Q. How is it designated?

A. Designated by the letter D.

Q. And in blue? A. In blue.

Q. To the east of the five-acre tract, does the drawing disclose the trust patent which borders it?

A. It shows the 20 acres of Lee Arenas in blue with the letter C.

Q. And to the south?

A. South is the 10-acre selection of Peter Siva.

Q. How is it designated?

A. It is No. 34, in blue.

Q. Does the drawing show another highway in that area?

A. It shows the state highway along the north of the section.

Q. What direction does that highway go?

A. It runs east and west.

Q. Are there allotments, trust patents in severalty, to [115] the other members of the Palm

(Testimony of C. H. Perdew.)

Springs Band which completely border the 40-acre tract?

A. Yes, sir.

Q. With reference to the north of that tract, what does the drawing disclose?

A. That is two 20-acre pieces of Laverne Virginia Milanovich and her daughter, Virginia Anne Milanovich, a minor.

Q. How is Laverne's shown? A. In blue.

Q. By what number? A. No. 9.

Q. How is Virginia Anne's shown?

A. No. 10.

Q. To the east of the 40-acre tract, what does the drawing disclose?

A. An allotment of Pricilla Anne Pete, shown as No. 60 in blue, 20 acres, and an allotment of Larry N. Hatchet, shown in blue as No. 7.

Q. To the south?

A. To the south is the allotment of Leonard Joseph Sauvel designated as No. 24, also in blue.

Q. And to the west of the 40-acre allotment?

A. That is portrayed by the 40-acre allotment of the heirs of Guadaloupe Arenas designated as D in blue. [116]

Mr. Brett: I will offer this as Respondent's Exhibit B.

Mr. Preston: To which we object on the ground it is not official and perhaps not correct, but there will be no objection to its being used as a method of illustration.

Mr. Brett: Both of these are offered only for illustrative purposes, your Honor.

(Testimony of C. H. Perdew.)

The Court: It may be received.

(The exhibit referred to was received in evidence and marked Respondent's Exhibit B.)

Mr. Brett: That's all, Mr. Perdew.

Cross-Examination

By Mr. Preston:

Q. Isn't there an official map of the allotments made in 1927 in your files?

A. In the office, yes, sir, but not with me.

Q. And doesn't each allotment, according to that survey, front upon an outlet of some kind to the street?

A. I don't think it does in the 5's and 40's.

Q. How is that?

A. The five and 40-acre selections don't.

Q. I am talking about Section 14. That does, doesn't it?

A. Yes. Not in all cases, but in most cases.

Q. Exhibit A here does not show the outlet for the Eleuteria Brown two acres, does it? [117]

A. No, sir.

Q. And yet there is an alley about 60 feet wide, is there not, right in front of it?

A. Yes, sir.

Mr. Brett: We concede, Judge Preston, that there are paths in there that can be used, and we make no issue on that point.

Mr. Preston: Your Honor, we filed a brief here——

The Court: Go ahead. I understand.

Mr. Preston: ——which shows by necessity we had a way out of a place like this, and we have it actually.

The Court: Go ahead. You can question him on it.

Mr. Preston: I am through.

The Court: Is that all?

Mr. Brett: That's all, Mr. Perdew.

The Court: You may step down.

(Witness excused.)

Mr. Brett: Now I will call Mr. Beckley, if I may, for cross-examination.

Mr. Preston: Be sure to stick to what was in already. [118]

BENTON BECKLEY

called as a witness by and on behalf of the Petitioners, being first duly sworn, resumed the stand and was examined and testified further as follows:

The Clerk: State your name, please.

The Witness: Benton Beckley.

Mr. Brett: This witness was on the stand in the other proceedings.

Cross-Examination

By Mr. Brett:

Q. Mr. Beckley, you have heretofore testified in proceedings before this court and in this case as a valuation witness in behalf of Messrs. Preston, Clark, and Sallee, on October 29, 1948?

(Testimony of Benton Beckley.)

A. That is correct.

Q. You were asked to state your opinion and did state your opinion at that time as to the reasonable market value of the three parcels which had been allotted to Eleuteria Brown Arenas?

A. That is correct.

Q. That testimony was given in October of 1948. If you were to give your testimony as to the value today, would it be any different, in your opinion, as to the fee value of those three parcels?

A. It is pretty hard to give a definite answer to that, [3*] Mr. Brett, due to the time that has passed in the past two years, and I have not had the time or taken the time to make an appraisal in the last two years. It would have to be a guess, which would be pretty hard to state here.

Q. You recall, Mr. Beckley, that I took your deposition on behalf of the respondent in Palm Springs on November 9, 1950?

A. That is correct.

Q. I will be specific in the record, if it is necessary, but do you not recall in such deposition you testified that it was your belief that the values had dropped from 10 to 20 per cent?

A. A leveling off of 10 to 20 per cent, I believe.

Q. In fixing the value which you previously testified to, you were fixing the value of the property as if it were owned free of any restrictions upon the right either to sell or to encumber the property, were you not? What we call, in other words, a fee simple title?

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Benton Beckley.)

A. A fee or a trust patent, either one. A fee title would be a right to sell, and in some cases would be a detriment to the property due to taxation on the property.

Mr. Preston: May I have that answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Brett): Do you mean by the answer that you at that time intended to evaluate the property as a trust [4] patented property and with a restriction which would prevent the patentee, the Indian, from selling the property, and with a restriction which would prevent the trust patentee, the Indian, from encumbering the property, and would restrict the trust patentee, the Indian, from leasing the property, other than for grazing or farming, for a period in excess of five years?

Mr. Preston: Your Honor, may I interrupt with an objection at this time? I announced at the opening of this case that the question would arise as to what we were evaluating in this proceeding. Now, that carries with it, what is the nature and extent of the Indian's right? It is our contention, your Honor, that the fee simple title exists in the Indian, and with the exception of the right to alienate it and maybe a few other incidental restrictions, but the restrictions, your Honor, are in the breast of the Government of the United States.

If the Government of the United States acts honestly and in good faith with the Indian, the title

(Testimony of Benton Beckley.)

of the Indian in the hands of the United States is just as good as a title in fee, and the fact that they can control the disposition of it, the alienation of it, does not detract from its value, in my opinion. In other words, if an Indian has an allotment of land and a chance arises to sell it, if it is to the best interest of the Indian that it be sold, it is the bounden [5] duty of the Government to yield and agree, and the Government has no estate in the land. The most it has is this supervisory guardianship right and, therefore, if consent to a sale is refused, the presumption is that the land is just as valuable retained as it would be to take the money for it after being sold and restrict the money.

So we come right directly to the facts in this case, your Honor, that the Indian's title cannot be measured in marketable title. Mr. Beckley cannot evaluate the right that way, because there is no market value to a piece of property that you can't sell. Mr. Beckley means the price that a piece of property will command in the market under market conditions, with a seller and a ready and willing buyer.

So when you get a witness on the stand and say, "What is the market value when you can't sell it?" that is an impossibility. It is an impasse right there.

So what you are to value in this case is the value of the property to the Indian, the Indian's value in the property.

I earnestly assert that there is no difference be-

(Testimony of Benton Beckley.)

tween the value of the property in the Indian's hands under a trust patent and a fee simple patent—a fee simple title—because if the trust patent guardian exercises the right that it should exercise, acts in good faith and not in a breach of its trust, the Indian's title is just as good as anybody else's and just as valuable. [6]

Now, in 181 Federal, page 62, you will find a footnote with all the quotations and extracts from all the decisions that were handed down to that date, on the nature of the Indian's title, and it is to all intents and purposes a fee simple title.

I have added to that another authority that I would like to pass up to the court. This is 224 U.S. 665. That case is, in my opinion, very enlightening in this proceeding. That is *Choate v. Trapp*. In that case some of the Creek Indians in Oklahoma surrendered their tribal rights to the Government and received allotments, and a covenant was made with the Indians that there should be no taxation by the State for a given period of years on those allotments. The state of Oklahoma undertook to violate that covenant, and the case went to the Supreme Court of the United States, and a very learned opinion was written there in which it was stated that the Fifth Amendment protects the Indian's vested right the same as anybody else's, and the Indian's right was a vested right, and the fact that he couldn't alienate it didn't detract from its being a protected right.

They further said that the Indian's condition

(Testimony of Benton Beckley.)

was likened to a non compos mentis person who owned a piece of property, or the estate of a minor that owned a piece of property. He couldn't sell. The management of it is in the hands of another. They illustrated the relation between the Indian [7] and the Government by reference to that relationship, and said that didn't detract from the fee simple title of the property. That is the condition here.

When he goes talking about the restrictions on it, that he couldn't sell it, or how much he would knock off if he couldn't sell the property, why, it wouldn't have any market value.

The Court: Didn't that come up on the final presentation to me?

Mr. Preston: It comes up right here. Mr. Brett will be here for hours bullyragging this witness about things of that character, if we don't have an understanding right now, or as soon as possible, as to what is the Indian's right in these lands. They put on these maps to show there is no road here, no street here now, no ingress here. That is not the test at all. The test is, what are the potentialities of the situation?

This witness cannot testify what his figures would be with these conditions. He asks him, how much it would be if he couldn't sell it, how much it would be if he couldn't mortgage it, how much it would be if he couldn't make a contract or make a lease beyond five years if the lease is for grazing land, and all that talk.

(Testimony of Benton Beckley.)

That can't enlighten the court, can't do anything but detract from the even tenor of this case, which is a very [8] simple one, to find out how much we ought to be paid, if anything, for our services.

I am making this address to the court now to inform him of our position, in order that we might in some way restrict this wild-goose examination that I know will take place, because they have got his deposition here in which they kept him on the stand for hours and hours and hours along the same line. Now he has got the deposition in front of him and wants to go over that again.

I say that is clearly out of bounds. It isn't anything germane to this case at all. The only question is, if the Government does its duty, how much is the land worth in the hands of the Indian? I say it is the full title value.

Mr. Brett: First, I will answer your Honor's inquiry. I think that is a matter you are going to have to settle. I know I seem to be the butt of many words, but I have to present the case as I believe my client requires it.

The Court: Go ahead.

Mr. Brett: I will explain the basis of this question. The mandate in this case arises out of three decisions in the Court of Appeals. The actual decision in this particular case was merely a portion of three decisions. The main decision in the mandate was in the Lee Arenas case. This case was tied in with it. In the decision and the mandate, they

(Testimony of Benton Beckley.)

cover the same ground. The court, as your Honor commented [9] this morning, referred to the fact that both your Honor and Judge Mathes had chosen to fix the fees on the basis of a percentage of the property. That fee was fixed as a percentage of the total property. One of the issues that was raised was the question of whether the Government still had an interest, any form of interest.

In determining those issues, the Court of Appeals held that the Government did still have an interest, and they used this language:

“The District Court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien, and in so doing should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian’s interest in the allotted land under the trust patent.”

It is my belief, and irrespective of my belief it is my instruction to the extent that the court will permit, that that requires proof and a determination by this court, not only of the fees in money but also of the value of the Indian’s interest in money and the Indian’s interest as defined by the Indian’s interest in the trust patent.

We are not maintaining that such rights as the Indian has do not constitute a vested right. We are not here [10] attempting in any way to disparage anything that the Indian has, beyond the extent of the description of it as has been fixed by statute.

(Testimony of Benton Beckley.)

The Statutes of the United States, Title 25, Section 345, expressly prescribe that it is to be a trust patent, and that the Indian may not, nor may anybody else for that matter, encumber it, nor may he sell it, except with the consent and approval of the Secretary of the Interior.

Title 25, Section 392, U. S. Code, expressly provides any sale or lease of the property can only be made with the consent and approval and at the discretion of the Secretary of the Interior of the United States.

Title 25, Section 403, of the United States Code, is an express mandatory statute of the Congress that the property may not be leased in any event, event by the Secretary, for purposes other than grazing or farming, for a period of more than five years.

All my questions are directed to there, to find out whether, in evaluating the Indian's interest, this witness considered those factors, and whether he either has or can or will evaluate it in that manner, because it is our conception and construction of the record that that is one of the two values which this court must fix.

I assume, although the decision doesn't say so, in part the determination of whether or not the fee you fix is [11] reasonable will be weighed in the light of the value which you fix on the Indian's interest, because that is one of the elements.

If Judge Preston feels that this court has the right to override the discretion vested in the Secre-

(Testimony of Benton Beckley.)

tary, I will cite you the case of the Cleveland Clinic Foundation v. Humphreys, 95 Fed. 2d 858, in which this terse statement is made from Colton v. Colton, 127 U.S., at page 322:

“The power fixed in the trustee will not be disturbed by the court in the absence of bad faith or fraud.”

Certainly the exercise by the Secretary of the Interior of discretion as to whether or not he will permit the sale of allotted property, or as to whether or not he will permit a lease of allotted property, could not be called either bad faith or fraud. That is the very source and the very agency in which Congress has vested the authority to exercise the discretion. There is no issue here that there has been any abuse of that discretion, or anything of that kind.

I think under those circumstances I should be permitted, and I will say, your Honor, I am not going to attempt to interrogate this witness on all the matters I interrogated him on in the deposition, but you realize in a matter of that kind you explore various things that you don't intend to reproduce in whole in court. I just want to ask this witness [12] a relatively few questions, but I think, in the light of the decision of the Court of Appeals, that I am entitled to interrogate this witness, and any evaluation witness who is proffered, as to whether or not he considered and evaluated the Indian's interest and to define, as I say, what the Indian's interest is.

(Testimony of Benton Beckley.)

Mr. Preston: May it please the Court, in the first place, the opinion does not require this court to find a set, fixed valuation of this property. It says you are to weigh the value of the Indian's interest as one of the many factors entering into the problem, but to come to an exact amount I don't think it is necessary. Judge Mathes ruled from the bench two or three times that limitations above or below would be sufficient to fix a dollar value. I don't think you are required to come to a dollars and cents valuation of these lands. You are only to consider the value as one of the elements involved.

As for the other situation, counsel misunderstands the problem, as I see it. The problem here is that the Government is before the court. The Government is represented by counsel here, and the Government represents the Indian and the Government. They are all before this court. They are here asking you to declare that when the Government lays its hand on an allotment, that it depreciates the title and depreciates the value of the property. [13]

He is asking you to absolutely hold that the Government's action is a detriment and an injury to the Indian's title. That is not the law.

The law will presume that the Government will act in good faith from the inception of a transaction until it is over, that it has no interest in the lands, that it has no duty to perform except for the Indian.

I say that the Government cannot lawfully be

(Testimony of Benton Beckley.)

heard to debase the title of the property and then ask the witness to go out and see how much this property is worth when the Government won't agree to let you sell it, won't agree to let you mortgage it, won't agree to let you lease it, won't agree to let you do anything with it that the Government doesn't want you to do.

He is asking you to capitalize their breach of trust. That is exactly what they are trying to do in this case. I say no witness can give money value on a piece of property that cannot be sold. It has no market value. There is no market value in it.

Therefore, it is only the inherent value to the Indian that can be measured in this case.

The Court: As a matter of fact, how do you go about to determine that?

Mr. Preston: How would you go about to do that?

The Court: Yes. [14]

Mr. Preston: The market value with a fee title.

The Court: Fee title?

Mr. Preston: Fee title, using that as a basis to derive the value to the Indian. That is the only way you can do it.

So I have asked this witness. He has testified and, of course, he has done it on the assumption that there was a fee title there that could be sold.

Now, they ask him, "How much would you cut it down if you couldn't lease it, and how much would you cut it down if you couldn't sell it?"

I say that is out of bounds and it is not germane

(Testimony of Benton Beckley.)

to the issue before this court. The issue before the court is, what is the value of this property to this Indian?

Mr. Brett: If the Court please, first, with reference to what your Honor's duty is, insofar, at least, as the Court of Appeals has defined it, I will ask the clerk to hand up our volume of 181 Federal 2d, and I think you will find the Court of Appeals used the word "determine."

Mr. Preston: Yes, but by using value as one of the factors.

Mr. Brett: "* * * in so doing should have considered and determined the value of the thing secured by the litigation."

That is the thing which the lawyers brought to the client, namely, the reasonable value of the Indian's interest [15] in the allotted land under the trust patent.

On that point, I submit that the use of the word "determined" would mean more than merely giving it consideration, and it would mean you would have to come to some determination of value.

Judge Preston refers to our debasing something. If the Court please, let's eliminate the Indian for a minute and assume what we have before the court is the evaluation of a life estate. Say the person has received an interest through the will or some trust and has a life estate. He can use it. He can dispose of it to the extent of his interest, lease it to the extent of his interest, but beyond that he can't do anything.

(Testimony of Benton Beckley.)

The Court: What is his interest?

Mr. Brett: Then, under those circumstances, would you say and could Judge Preston possibly say to you, as the court, that if the lawyers on the other side were seeking to have the valuation to be of the life estate, other than a fee, that because of the fact or the manner in which it was created, it was not a fee, that it is being debased?

What the Indian has received under the law, and I can't change that, and I submit the court can't change it, is a life estate in this property. He has a limited right of use of the property. In certain respects, he has an exclusive right to use it. He can use it himself. He can permit others [16] to use it under limited conditions, that is, he may lease it for ten years for grazing or agriculture purposes, provided the Secretary of the Interior approves. Or he may lease it for business purposes, that is, income purposes, other than for farming or irrigation or grazing, for five years, and the statute on that is express.

Title 25, Section 403, says he may not do so beyond five years, and I submit that means even the Secretary can't permit him to do it.

Now, that is what he has. That is what these attorneys recovered, because that is all she could get. They can't recover any more than that at the utmost.

In reference to the matter of evaluation, this is no different than many evaluation problems. We always have to assume whatever interest does exist

(Testimony of Benton Beckley.)

is a salable article, because all values are hypothetical. There has been no sale and couldn't be a sale.

So what we have to do is fix the interest. Either in eminent domain or any other proceeding, we first have to define the interest, and then assume that that interest could be sold.

Certainly I know of no rule of law, and I don't believe Judge Preston can cite you one, that you can entirely disregard the limitations. I can't conceive of a valuation of a life estate being made on the theory use of it as only a life [17] estate gives him a fee simple title. There is no magic about it.

All this decision has determined is that the Secretary in the first place should have allotted it to the Indian, and, having decided that, the Indian from that decision had the benefit of the same effect as if it had been allotted. Under those circumstances, if the Court please, I believe that this decision of the Court of Appeals requires you to evaluate it.

Mr. Preston: May I close the debate with one word or two. Why doesn't he use a probate estate? When you are going to appraise it for the purpose of a probate sale, which must be approved by the court, you value the whole title. Why didn't he use a *non compos mentis* case to be evaluated the same as if he had a sound mind? A minor's property would be evaluated the same as if he were 21 years of age.

This thing illustrates itself. You will notice the

(Testimony of Benton Beckley.)

position taken by counsel, he says he has got to assume that the Indian can sell. Did you notice that? You must assume that the Indian can sell his property. Then that is a fee simple title. He says you must assume, then, in order to go into any of these issues, that he wants to go into, you have got to assume that the Indian can sell his property right. I have cited you a case where they held it is a vested right that can't be disturbed. It is protected by the Fifth Amendment. [18]

We have shown you here the Government has no interest in the property. Its sole duty is to the Indian. It doesn't have a nickel's worth of estate in it. It is a fee simple title except for the restriction of alienation, and now Mr. Brett removes that restriction of alienation. He says you have got to assume he can sell what he has got. That should end the argument, because he is admitting that the Indian must be presumed to have the right to sell his allotment, and that gives him a fee title.

Mr. Brett: I guess I have a right to close this now.

Mr. Preston: No, you don't.

The Court: Well, somebody close it. You people have been arguing over and over again. You keep repeating your position to me. I have got to pass on the primary question. Are you through? I want to rule.

Mr. Brett: No. I would like to answer that one phase.

The Court: And then he will answer you, and

(Testimony of Benton Beckley.)

you will want to answer him, and you will be going all night. That is no way to try a lawsuit. I think I have given you enough time to express your opinions.

Mr. Brett: The only thing is, he is misinterpreting what I said.

The Court: Every time one of you says anything, then the other misinterprets it another way. I will say to counsel now—Will you just keep your seat a minute and quit [19] jumping around? It interrupts me.

Mr. Preston: I didn't hear that.

The Court: If you can keep your seat a minute——

Mr. Preston: I can't hear you. That is the reason I am standing, only for that reason.

The Court: The court realizes that the ultimate question here under this decision of the Court of Appeals is, what is the extent of the Indian's interest in this property under this Act of Congress, allowing these Indians these different allotments in this reservation? That ultimately has got to be decided by the court in fixing the value of the attorneys' fees for the services that they have rendered in this suit.

Now, you call a witness here and he is about ready to testify one way or another, with these limitations the Government reserved, its control, and if the alienation of the property is restricted, that, therefore, that depreciates the value of the Indian's interest. I have got to pass on this, if they

(Testimony of Benton Beckley.)

do exist, and if they do, to what extent do they depreciate the value of the Indian's interest in the property which the court passed on but didn't state what it was. The Court of Appeals make a glittering generality in that opinion. They don't tell you and I here what it is, so we can properly try this lawsuit. They put the bridle around both of our necks here and try to get me to decide it. One says it is fee simple interest. One says it is a title with [20] limitations, controlled by the Government. That is the question I have got to determine here in determining the value of the services in this matter in controversy. That is what the Court of Appeals says in that opinion. I have got to determine what is the value of this land, whether reserving the right of control to the Government, or whether the Indians have a right to sell and dispose of this land.

How am I going to determine the value? How are you going to get at the value? An interest in real estate with a limitation on it of control, and denying alienation, is different from a fee simple title with the right to sell and without any interference by the Government. There is a difference there. You both disagree fundamentally on that theory.

I think I had better receive this evidence with the understanding that whatever theory the court will take, the court will make an order striking the balance of the evidence from this record, whatever doesn't substantiate the court's ultimate opinion.

(Testimony of Benton Beckley.)

I have got to do it under this decision of the Circuit Court of Appeals.

One minute they say determine the Indian's interest, then they say determine the matter of the value in controversy, the property, the allotment.

Nothing else is here except the value of the services rendered by the attorneys. We have got to determine the [21] reasonable attorneys' fees to be paid after considering the extent of the services rendered by the attorneys. The Circuit Court of Appeals has made it somewhat puzzling to get at it.

Now, I am going to allow you to question him with the understanding, if the court takes the position against which you are contending for, I will make an order striking the testimony.

Now, go ahead.

Q. (By Mr. Brett): Mr. Beckley, are you prepared today to state an opinion as to the value of the two-acre parcel?

Mr. Preston: You mean as of what date?

Q. (By Mr. Brett): As of today, assuming that you are evaluating the trust patent interest of Eleuteria Brown Arenas, and such trust patent interest is a vested right of the title to the property, but with the restriction that she may not sell the title to the property except with the consent and approval of the Secretary of the Interior, in his discretion.

Mr. Preston: To which we want to make an objection, your Honor. The date involved in this inquiry is 1948, May 18th, I think, and not the

(Testimony of Benton Beckley.)

present day. The present-day value might have some reflection on it, but it is not the date upon which the evaluation is supposed to be made, as I understand it. These services were rendered May 18, 1948.

The Court: Very well. Go ahead. You may answer. [22]

Mr. Brett: I haven't finished the question.

The Witness: The appraisal at the time in 1948, would be eighteen to twenty thousand dollars per acre.

Mr. Brett: I haven't finished the question.

The Witness: Regardless of what it is, whether in trust or fee title, that will cover that.

The Court: How much?

The Witness: \$18,000.00 to \$20,000.00 per acre.

Q. (By Mr. Brett): You mean regardless of any restrictions? A. As of the date in 1948.

Q. Regardless of any restrictions that might appear on the property or its use?

A. Yes, sir. I don't believe the Government will restrict this property in any way to hurt the value of it, and over a considerable time there will be an increase in value, rather than a depreciation. Maybe that will cover all of it for you.

Q. Do you state the same opinion, as far as no change in value between a fee simple title and a restricted title, to either the 5-acre or the 40-acre parcel? A. That's right.

Mr. Preston: You understand we are objecting to that.

(Testimony of Benton Beckley.)

The Court: I understand.

Mr. Preston: We are adhering to the ruling of the court [23] and not interfering for that reason.

Q. (By Mr. Brett): Did you answer "Yes"?

A. Yes.

Q. In other words, no matter what restrictions did exist on either the sale or the use of the property at the date of your evaluation——

A. That is correct.

Q. ——it is your opinion that the value would be no different than it would be if there were no such restrictions? A. That's right.

Q. Now, Mr. Beckley, will you turn to page 97 of your deposition?

A. O.K. (Witness complying.)

Q. Did you not testify on November 9, 1950, in answer to questions I put to you, as follows:

"Q. (By Mr. Brett): Now, I am going to ask you to assume for the purpose of this question that the Indian's interest in these three separate parcels that we have discussed is the right to receive in the future at some unnamed time, and which could not now be definitely determined, a complete fee simple patent, and the right until he or she, or until she receives such fee simple patent, aside from her own right to personal use in occupancy, which would restrict any sale of any kind or any lease of any kind or any [24] incumbrance of any kind—and by 'restricted' I mean prevented, prohibited by law—and would only permit the

(Testimony of Benton Beckley.)

right to give a third party the right of use for residential or business purposes for a term not to exceed five years, and subject to being approved by the Indian Office and subject to revocation—and by ‘revocation’ I mean to be terminated completely upon 30 days’ notice with the consent and approval of the Indian and the Indian Office.

“Now, do you have in mind that set of factors? A. I do.”

A. Yes, I do.

“Q. Now, having that set of factors in mind, and assuming that that is the Indian’s right, are you in a position at this time to give an opinion as to what you believe the value of the two-acre parcel is, that is, of that right in the two-acre parcel, the reasonable market value?”

“A. If those restrictions were put in and were held in force and everybody knew those would be that way for a period of years so it couldn’t be changed, then it would affect the value considerably.”

Did you not so testify?

A. That’s right.

Q. Is that not your opinion? [25]

A. In one way, it is. You put your five years with a 30-day revocation permit, and over the period of years, I don’t believe the Government would restrict this property and try to hold those restrictions which would affect the value.

(Testimony of Benton Beckley.)

Q. Did you not testify, on page 98, in answer to my question, as follows, page 98, line 25:

“Q. Well, now, assuming the same factors, but applying my question to the five-acre tract, would your answer be the same?

“A. The same thing on all of it.

“Q. Would it equally apply, with the same factors, to the 40 acres? A. That’s right.

“Q. In other words, you couldn’t at this time give an opinion?

“A. I couldn’t give an opinion, because there is too many things against it. I just don’t want to commit myself.”

A. We were talking about the property valuation from the present date to 1948.

Q. No. The value of the trust patent I have just described. Did you not at that time testify as I have just read? A. I did.

Q. Is that your opinion? [26]

A. You have it mixed up in there, and it is pretty hard to answer it direct there.

The Court: We will recess until tomorrow morning at 10:00 o’clock, and you can think it over.

(Thereupon a recess was taken until the following day, Tuesday, November 28, 1950, at 10:00 o’clock a.m.) [27]

November 28, 1950—10:00 A.M.

The Court: You may proceed.

Mr. Brett: Mr. Beckley.

BENTON BECKLEY

called as a witness by and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Brett:

Q. When you fixed the values which you stated in the proceeding in court on October 29, 1948, of the 2-acre, 5-acre, and 40-acre parcels allotted to Eleuteria Brown Arenas, you recognized that they were then subject to certain restrictions, both as to the right of sale and as to the right to encumber, didn't you? A. I did.

Q. But you believed that at some time in the future, which time you couldn't definitely fix, that they would be removed so that the property could be sold free and clear of all restrictions?

A. Well, regardless of any restrictions, Mr. Brett, either way, my opinion is still the same. It wouldn't make any difference.

Q. Will you please answer the question? [29]

A. It didn't, according to the restrictions. Is that what you want?

Mr. Brett: Will you read the question, please?

(The question was read by the reporter.)

(Testimony of Benton Beckley.)

The Witness: I believed that the Government at some time or other would have removed part of the restrictions, acting as guardian of the Indian. I don't think they can hold them forever in that status.

Q. (By Mr. Brett): You fixed your value assuming that such restrictions had been removed, didn't you? A. That had not been removed?

Q. No. I say you fixed your values on the assumption that at the time of the sale the restrictions would have been removed?

A. Either way, Irl, whether it had been removed, or whether they were on it. I know sometime or other they would have to be removed.

Q. Didn't you fix your values after they had been removed? A. At some time or other, yes.

Q. In other words, you were fixing the value with the restrictions off of the property?

A. That's right.

Q. I mean you knew that the two-acre parcel is zoned by the City of Palm Springs in what is known as an R-1 zone, [30] didn't you?

A. That's right.

Q. And that limits the use of the premises, of the two-acre parcel in Section 14, to single residences? A. That's right.

Q. And you fixed the value which you gave on October 29, 1948, upon the assumption that somehow, sometime in the future, the zoning would be changed so that the property could be used for business purposes?

(Testimony of Benton Beckley.)

A. Regardless of the restriction, whether it was R-1, or anything, Irl, I based my price on that value.

Q. Will you please answer the question?

Mr. Preston: He did answer it. I submit it is responsive.

The Court: He said regardless of it. That is an answer, isn't it? Do you want him to say it again?

Q. (By Mr. Brett): Now, Mr. Beckley, again I refer your attention to the fact that I took your deposition in Palm Springs on the 9th of November.

A. That's right.

Q. Then we had it transcribed.

A. That's right.

Q. And you took it home with you last week end.

A. I took it home for one night, yes, sir.

Q. And you have examined it? [31]

A. Yes, sir.

Q. And made such corrections as you desired to make?

A. Yes, sir.

Q. And then swore to it before a notary public in Judge Preston's office yesterday morning?

A. That's right.

Q. Is it not true that on page 103, commencing at line 7, that this question was asked you?

“Q. Well, let's put it this way, then: Assuming there was a hypothetical purchaser for the two-acre parcel, and you were representing the Indian as real estate broker to sell it, in fixing your value here, and if that purchaser had asked you, ‘Well, now, when is it going to

(Testimony of Benton Beckley.)

be so that I can do these things that you have stated without restriction?' you would have to tell the purchaser, and you assumed you would have had to tell the purchaser, 'I don't know, but I think it will be done.' Is that about it?"

And did you not answer:

"No. I would not even contemplate selling it until the time it could be sold."

And then I asked you:

"You were figuring value at the time it could be sold? A. That's right." [32]

Isn't that correct?

A. All the way through this, I am taking the stand the property can be sold, is that right, at some time?

Q. And you evaluated it at the time when it can be sold?

A. The value of the property is put at the time it can be sold for some cash and you have a buyer and a seller. Is that right?

Q. Mr. Beckley, I don't answer questions.

A. I mean it can't be sold until it is—Well, go ahead.

Q. I just want one answer. You valued this property as of the time when it could be sold?

A. That is correct.

Q. Free and clear? A. That is correct.

Q. Now, Mr. Beckley, I will show you Respondents' Exhibit A, which is a drawing. You have been in Palm Springs since 1936, is that correct?

(Testimony of Benton Beckley.)

A. Yes, sir.

Q. Examine Exhibit A and state if that doesn't, merely for illustrative purposes, illustrate the general location of the two-acre parcel with reference to Indian Avenue and to Palm Springs Drive.

A. That's right. [33]

Q. This two-acre parcel is some 520 feet easterly of Indian Avenue?

A. Five hundred, twenty-eight feet east.

Q. I meant 528 feet. A. That's right.

Q. It isn't located on any existing street that is now being used for business?

A. That is correct.

Q. The nearest street which is being used for business is Indian Avenue?

A. Let's put it this way. There are streets, but I don't know whether they are dedicated or not. Dirt roads, desert roads, we call them.

Q. In other words, there are certain oiled ways in which you can get to these properties?

A. Not oiled. The Government has neglected that for the last 10 years. Let's put it dirt roads.

Q. There are certain dirt roads, but the particular two-acre parcel is at least 528 feet from the nearest street? A. That is correct.

Q. And that is considerably in excess of the depth of any of the lots on Indian Avenue?

A. The lots vary according to who has leased them out, what Indian or the Department. They will vary from 125 to 50 feet in depth. [34]

Q. This particular property, at the time that

(Testimony of Benton Beckley.)

you valued it in 1948, was occupied by small shacks, lean-tos, tents, and other low-valued habitations?

A. That is correct.

Q. And not only it, but the properties surrounding it on all sides were equally so occupied and used?

A. That is close, within 50 or 150 feet, I would say.

Q. With reference to the Respondents' Exhibit A, you will notice that there is shown on all sides of it, an allotment.

A. That is correct.

Q. Those particular allotments that are shown there, 47, 49, 51, and 42, were all equally occupied and used, weren't they?

A. That is correct.

Q. Now, when you gave your value on those two lots of between \$18,000.00 and \$20,000.00 per acre—is that correct?

A. That is correct.

Q. That would be free of all restrictions?

A. Regardless of how it was.

Q. You testified at the earlier hearing that you had sold certain lands in the Palm Springs area, but you have never sold any property in the Indian reservation, have you?

A. No.

Q. So that we can get some relative date, my next few [35] questions are all going to start with January, 1944, and up to the present date; in other words, allowing about six and a half years or almost seven years.

A. All right.

Q. During that period of time, you have never sold as much as one acre in one piece in Palm Springs, have you?

A. No, sir.

(Testimony of Benton Beckley.)

Q. Now, in arriving at your value, you considered certain properties in Palm Springs, as having some comparative value to this land, and derived your value on that basis, didn't you?

A. That is correct.

Q. For example, again referring to Respondents' Exhibit A, I direct your attention to an area which is along Ramon Road—I mean which is along Indian Avenue and just north of Ramon Road——

A. That is correct.

Q. There are a number of developed properties along that area, are there not, business properties?

A. On the reservation?

Q. Business properties.

A. To to the north of Ramon Road?

Q. Yes. A. Yes.

Q. Just north of Ramon Road, as shown on Respondents' [36] Exhibit A, there is an area on Indian Avenue that runs from Ramon Road until Indian Avenue intersects Palm Springs Drive on the south? A. That is correct.

Q. And on the corner, which would be the southeast corner of Ramon Road and Indian Avenue, there is a substantial hotel known as the Miramonte? A. Southwest corner.

Q. Southwest corner? A. That is correct.

Q. That property was a property which had been sold as an operating hotel property?

A. That is correct.

Q. And in part you based your conclusion that the value of these two acres was from \$18,000.00 to

(Testimony of Benton Beckley.)

\$20,000.00 per acre upon your knowledge of the sale of that operating property and the income which had been derived therefrom, didn't you?

A. Not of that hotel, Irl. That is the Miramonte. They had one offer of that, and a man in Alaska wanted it, and they refused to sell it.

Q. Then you based it upon that offer and the refusal to sell?

A. That's right, and also the previous party who owned it, Pliners. [37]

Q. And you based that, as far as that is concerned, upon the income derived from the hotel?

A. Not the income. The approximate income I think would arrive from it from the number of rooms and apartments.

Q. In other words, you based it on your assumption as to what could be the income from that property?

A. We know what rooms are worth in Palm Springs and what they rent for, and you can judge your value by what they should bring in.

Q. Mr. Beckley, I will ask the reporter to read my question and ask that you answer it.

(The question was read by the reporter.)

A. That is correct.

Q. There is another substantially improved property, having a number of units, known as the Voronado Hotel, which was just south of this other hotel, and on Indian Avenue.

A. That is correct.

(Testimony of Benton Beckley.)

Q. And you had knowledge of the transaction under which that was sold as an operating hotel property, didn't you?

A. Not the price paid for the Voronado.

Q. What was it you used?

A. The vacant lot to the north of that. I sold that lot as a vacant piece of property.

Q. Did you not also use the hotel and its income? [38]

A. That's right.

Q. You did use that?

A. I don't know the purchase price of the hotel, though.

Q. But you did use the income of the hotel as one of your bases?

A. That's right.

Q. The lot you refer to was between these two operating hotels and was on Indian Avenue?

A. That is correct.

Q. It had frontage on Indian Avenue?

A. That is correct, 60 feet.

Q. On Indian Avenue. As I understand it, the judge has not had the opportunity of being in Palm Springs. Indian Avenue is the second most important business thoroughfare in Palm Springs?

A. It will be the first in importance if it is widened.

Q. But it is the second now?

A. That is correct.

Q. And the most important business thoroughfare in Palm Springs is Palm Canyon Drive, as shown by Respondents' Exhibit A, between Alejo Road and Ramon Road?

A. That is correct.

(Testimony of Benton Beckley.)

Q. As a matter of fact, Mr. Beckley, this area which is bounded on the north by Alejo Road and on the east by Indian Avenue, on the south by Ramon Road, and on the west by [39] Palm Canyon Drive, is the heart of the business district of Palm Springs, isn't it?

A. It is the heart now, Irl.

Q. At present? A. At present.

Q. And was when you testified in 1948?

A. That is correct.

Q. It is improved with such improvements as the principal hotel, the Desert Inn, which faces on Palm Canyon Drive? A. That is correct.

Q. By Bullock's, a branch of one of the large department stores in Los Angeles?

A. That is correct.

Q. The Plaza, which is adjacent to Palm Canyon Drive, and is shown on Exhibit A, has a branch of Desmond's, one of the leading men's furnishing stores of Los Angeles? A. That is correct.

Q. Shortly above, that would be to the north of Bullock's on Palm Canyon Drive, there is a branch of J. W. Robinson Company, which is one of the main department stores of Los Angeles?

A. That is in the Desert Inn.

Q. Then, in addition to that, there are the Bank of America, all of the motion picture theaters, and practically all, if not all, practically all, of the principal shops? [40]

A. Do you want me to tell you the reason for that?

(Testimony of Benton Beckley.)

Q. No. I am asking you if that isn't true.

A. That is true.

Q. In fixing the value of \$18,000.00 to \$20,000.00 per acre on this two-acre parcel, you considered your knowledge of the sales and of the operation and of the income of the properties within that business heart of Palm Springs, didn't you?

A. That is correct.

Q. Now, I will show you Respondents' Exhibit B, and I will ask you if, for purely illustrative purposes, that does not generally illustrate the location of State Highway 111, which runs to Indio, and of Palm Canyon Drive, extending southerly below Ramon Road? A. That is correct.

Q. And it also shows the general location with reference to those two points and with reference to other allotments, of the 5-acre and 40-acre parcels?

A. That's right.

Q. Now, as to the five-acre parcel, the five-acre parcel has certain small dwellings located on it?

A. That is correct.

Q. And it also has frontage on Palm Canyon Drive of some 330 feet?

A. That's right. [41]

Q. And has a depth of 660 feet?

A. Correct.

Q. The buildings upon the property do not belong to the Indian?

A. Not that I know of today, Irl.

Q. At any rate, in fixing the value, you did not assume that the Indian owned any of them?

(Testimony of Benton Beckley.)

A. That is correct.

Q. That property was likewise zoned by the City of Palm Springs so that the frontage was zoned for residential purposes, R-1?

A. That is correct. There might be a part of it in trailer.

Q. And the rear portion of it was zoned for trailer park?

A. That is correct.

Q. While there is a roadway that runs into the property, dirt roadway, I believe that is oiled, isn't it?

A. Partly.

Q. There is no dedicated road in there?

A. Not that I know of.

Q. That is approximately from one and one-quarter to one and one-half miles from the heart of Palm Springs, isn't it?

A. Yes. [42]

Q. And the heart of the business district?

A. That is correct.

Q. And that property, consisting of five acres, you valued in fee, that is, free of all restrictions, at \$12,000.00 per acre?

A. That is correct.

Q. Now, Mr. Beckley, do you know of any sale of any piece of property that is not within that area that I described heretofore as being the heart of Palm Springs, that is, bounded by Alejo on the north, by Ramon on the south, by Indian Avenue on the east, by Palm Canyon Drive on the west, which does not front upon a business street that is zoned for business purposes, that has sold since January 1, 1944, to date for \$12,000.00 an acre?

A. No, I don't, Irl.

(Testimony of Benton Beckley.)

Q. Do you know of any such property as I have just described that during that period has sold for \$10,000.00 an acre? A. No.

Q. Do you know of any such property as I have just described that was sold for \$8,000.00 an acre?

A. There has been a piece to the south of this, Irl, that has been sold. I don't know for what figure. That is the only acreage I know that has been sold in the Palm Springs area in that vicinity between these dates you put. [43]

Q. At any rate, in fixing the value of \$12,000.00 an acre, you did not personally know and you do not personally know of any such property that I so described sold since January 1, 1944, for \$8,000.00 an acre? A. No.

Q. Do you know of any such property as I have just described that sold for \$6,000.00 an acre during that period?

A. I answered your question on acreage. There have been lots. There has no acreage been sold that I know of, let's put it that way. That will eliminate all of this.

Q. In other words, you don't know of as much as one acre, then? A. That is correct.

Q. Do I understand correctly you don't know of a sale of as much as one acre in that period of time?

A. Not in a whole piece. There have been a few transactions I don't know of and what has gone on. I know houses and lots surrounding that prop-

(Testimony of Benton Beckley.)

erty that have been sold. That is what I arrived at my conclusion from.

Mr. Preston: Surrounding the property?

The Witness: Not surrounding the property. Adjacent to or west of the five acres, put it that way.

Q. (By Mr. Brett): How large are the lots?

A. 60 by 150, 162, 142. They vary. It is rolling land and there are smaller and larger pieces. [44]

Q. How much larger?

A. They run up to 200, 230, by 100 feet. Back toward the mountain there is larger pieces.

Q. But you don't know of any sale since January 1, 1944, of as much as one acre?

A. There might have been, and—No, I don't, Irl, not myself.

Mr. Preston: Did you ask him for the prices on those or not?

Q. (By Mr. Brett): You have also considered, in fixing your valuation on this two-acre parcel in Section 14 and the five-acre parcel in Section 26, that we have just discussed, some duplexes and multiple-building units that are located upon streets just south of Ramon and east of Indian Avenue, haven't you?

A. That is the southern part of Indian Avenue, they are on.

Q. They are shown on Respondents' Exhibit A as Calle Ajo, Calle Encilia, Calle Saint Rosa, and Calle Abronia Aurita, is that correct?

A. Yes.

(Testimony of Benton Beckley.)

Mr. Brett: I don't know whether his Honor is familiar with what we call in California a duplex or not.

Q. (By Mr. Brett): A duplex is a multiple unit where you have one residence above and one below? [45]

A. Not above. There are no two-story buildings in Palm Springs.

Q. A duplex is where you have two residences in a unit? A. Yes.

Q. And a multiple unit would be where you have more than two? A. That's right.

Q. These were improved units that were sold that were being operated for rental to guests who had come to Palm Springs? A. That's right.

Q. And you gave consideration to those improved units and their income in arriving at the valuation of the two-acre and five-acre parcels, didn't you?

A. The income and sale of them, Irl.

Q. And the sale of those units as so improved?

A. The property and the units.

Q. Again examining Respondents' Exhibit B and the 40-acre parcel, the 40-acre parcel is located approximately how far from Ramon Road?

A. Approximately one-quarter of a mile.

Q. And about how far from Palm Canyon Drive? A. Approximately a half-mile.

Q. Although it would have of necessity a way of ingress and egress, there is at the present time no roadway [46] that runs to it, is that correct?

(Testimony of Benton Beckley.)

A. I believe that is correct. There might be a desert road, we classify it. I don't know. They have been dumping trash along it now for the last six months, I know.

Q. You valued that parcel of 40 acres at from \$180,000.00 to \$200,000.00?

A. That is correct.

Q. Which of those figures do you choose? Which is the figure that you believe is the value?

A. I would take the \$200,000.00.

Q. \$200,000.00? A. That is correct.

Q. That would be \$5,000.00 per acre.

A. That is right.

Q. Do you know of any pice of land, which is not on any street, that is not contiguous to and adjacent to any street, which has sold since January 1, 1944, for \$5,000.00 an acre?

A. Irl, there may have been maybe two or three large pieces rather close to this property, privately owned property, which have not been up for sale, owned by two or three individuals in Palm Springs. As far as acreage, it is pretty hard to find any acreage in the Palm Springs area.

Q. Is your answer to my question "No"?

A. No. Read that over again. [47]

Mr. Brett: Will you read the question, please?

(The question was read by the reporter.)

The Witness: No.

Q. (By Mr. Brett): Now I have a rather long

(Testimony of Benton Beckley.)

hypothetical question. I have had a copy made of it.

A. Can't we break these down into smaller question and I can answer yes or no?

Q. I am going to read this to you.

Assume that the interest of Eleuteria Brown Arenas in the 2-acre parcel, the 5-acre parcel, and the 40-acre parcel, described in the complaint in 6221-PH Civil, as represented by the trust patent in severalty conveyed to her, consists of the vested right to receive at a subsequent date which is not now known, providing that she does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered she has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative, and has the right to lease such property to a third party or parties who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his [48] authorized representative; that she is entitled to receive the income derived from such leases unless the Secretary of the Interior of the United States shall determine in his discretion that such income shall be held in trust for her benefit by the Office of Indian Affairs; that the present trust period ex-

(Testimony of Benton Beckley.)

pires on May 9, 1952, but may be continued for periods not to exceed 25 years without her consent and at the sole discretion of the President of the United States; that during the last 30 years all trust patents in severalty have been extended for 25-year periods prior to their expiration by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of her death before she receives such patent in fee simple and free of restrictions, her rights will descend to her heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, she may dispose of the same by Will; that until she receives a patent in fee simple free of restrictions, she may not sell and may not encumber her interest under such trust patent to any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion, would be the fair market value [49] of such interest in said 2-acre tract?

Mr. Preston: Just a minute. May it please the Court, I assume this is along the line of the discussion we have already had in this matter, but I desire to object to this question upon the ground that it does not properly characterize the Indian's interest. The interest of the Indian, as set forth

(Testimony of Benton Beckley.)

in the decision in this case, and in the footnote quotations and the statements that I made I cited to the court, gives the Indian a fee simple title in an equitable estate. The Indian has in all essential respects a fee simple title with the right of alienation restricted. This question is objectionable for that reason, but more objectionable for a further reason.

In order for there to be a fair market value, there must be a seller, and a willing seller, and a willing purchaser, and the willing purchaser must be willing to buy with full knowledge of the facts, and the seller must be willing to sell with full knowledge of the attributes and qualities of the property.

Now, when this Indian sells, he sells the whole title or nothing. It can't be true that a purchaser from this Indian would still be under guardianship by the Government and his rights under restriction by the Government at all. So when you ask the witness a question which does not permit the Indian to sell what he has, you are getting what is known in [50] the law as a *felo de se*. The question destroys itself, because it can't be true that the assumptions made here are correct and still the Indian have a right to sell his property.

With that exposition of my views, at least, of what the law is in this matter, this question is objectionable because it destroys itself. It can't be true that the Indian can sell his land and still the purchaser be bound by the same covenants and

(Testimony of Benton Beckley.)

conditions that the Indian is bound by now. That couldn't be. That is an impossibility and it is a monstrosity, besides, and as I said before, it is a question that suicides itself and is not a proper question for the consideration of this court.

Mr. Brett: I say first, your Honor, it is my understanding your Honor had indicated yesterday, since you are going to have to later determine the legal question, you are going to hear the evidence and later rule. That was my purpose. However, very briefly, I will state this: This does describe specifically—and before we get through here, by citation or by evidence, I will be able to show your Honor that it does specifically and exactly describe the exact status of the property which we have got to value.

Judge Preston is right in saying such an interest couldn't be sold any more than you could sell a public bridge or park, or something of that kind, but in those instances in which you are required to place a value, you have to assume whatever [51] that is, whether it is a limited or a full interest. You assume there would be a willing seller and a willing buyer, but what is being sold is being evaluated with whatever may be the limit on the interest.

That is what I understand the Court of Appeals has directed. It may be, after your Honor has considered the matter, you will rule to the contrary, and, as I understood yesterday, if you do so rule you will strike this testimony out. However, we will have it in the record if we desire review.

(Testimony of Benton Beckley.)

If you don't let it in, there is nothing before the court to review, so I want his answer or his statement that he can't answer, and then your Honor will subsequently rule after we close this matter.

Mr. Preston: I want my objections to be understood by the court, and perhaps he does understand this better than I do now, but, as I understand this situation, this Indian is now going to sell what he has under this question, and if he is going to sell what he has, that is begging the question, because he is going to sell a legal title, because all the interest of the Government is to keep him from selling, and these other restrictions all fade away when the sale is made to a purchaser. Every restriction that is on the land is embodied and contained in the restriction of the sale, and when the restriction on sale is removed, it removes every [52] restriction, and this witness, all he could do in the world under such a question would be to say what he said already.

I don't want to put any answers in his mouth, but this question is self-destructive, because it is based on the very proposition that is impossible for him to perform, and if he can perform it he has a fee title.

The Court: As the court stated yesterday, I reserve the right to rule on what I consider one of the primary questions in determining the rights of the Indian and how to determine the valuation of this land. I reserve the right to rule on that after the case has been finally argued and submitted to

(Testimony of Benton Beckley.)

me for further consideration, and I do so now in regard to this hypothetical question.

You may go ahead and answer, but with the understanding, as I stated yesterday if the court reaches the conclusion that the answer was improper, it will be stricken from the record. If not, it will stand and I will have the full record before me, and so will the reviewing court, if it goes any further, so they can decide this case and bring it to an end some day on what constitutes valuation of the interest of the Indian. I think that is the way to do.

I will say to counsel now, I *don't* *how* you think, but could arrangements be made so that the reporter could furnish me a copy of this hypothetical question and your objections and your argument on the question here now, thus boiling it [53] down on that one primary question? That would help me in having it before me when I take this case under consideration, which I am going to do. It is not going to be decided right from the bench, because I am not prepared to do so until I hear the whole case and the arguments of counsel. Can you make arrangements so that the reporter can furnish me with a copy of that part of the record?

Mr. Brett: I can never answer that question categorically, but I feel I can and I will.

The Court: It isn't very long. I want just your objections and your arguments pro and con right now on this question, because you are boiling it down pretty close on that question.

(Testimony of Benton Beckley.)

Very well, then, with that understanding I will reserve ruling and let him answer this question.

Mr. Brett: One other thing, your Honor. In order not to extend this matter, as we did yesterday, I desire no further argument, but I understand your Honor is going to permit me to cite authorities and make an argument later.

The Court: Yes. When you submit the case finally, I will give you time to file briefs, of course.

Mr. Preston: Is it your Honor's idea you will need no more of the record than this?

The Court: I may call on you for more of it. I don't know yet. I said that as to this particular question, because [54] you are boiling this down pretty close on this question. There may be other parts of the record I will want.

He may answer the question now.

The Witness: I cannot answer this question, Mr. Brett. I would rather hold—there are too many little “ifs” and “ands.” But I will say my judgment on the price, with or without restriction, is still going to stand at \$200,000.00. If this case goes on for another five or ten years, it will go to \$400,000.00, because I know this property is going up in value every day in Palm Springs, and since this trial started the value has doubled or trebled.

You can't move the land now, unless it is moved like they have done it a few places on the reservation. If it stands as it is today, it will be \$200,000.00. In another ten years, it will be double. Palm Springs has gained at the rate of 10 per cent a year.

(Testimony of Benton Beckley.)

The town is going ahead. It isn't going backward. That probably doesn't answer you, but——

Mr. Preston: The question calls for an evaluation of all three of the tracts.

The Court: This \$200,000.00 relates to the 40 acres?

Mr. Brett: Yes, that is right.

Q. (By Mr. Brett): Is your answer that the value of that interest that I have described in the hypothetical question of the two-acre parcel would be from \$18,000.00 to \$20,000.00?

A. \$20,000.00 per acre. [55]

Q. What, in your opinion, would be the fair market value of such interest in the five-acre tract?

A. It will remain the same, \$12,000.00 an acre.

Q. And what in your opinion would be the fair market value of the 40-acre tract?

A. \$200,000.00.

Mr. Brett: If you will pardon me just a minute, I am about through with the witness.

The Court: Let me see if I have this. As to the two acres, you fix a value of \$12,000.00?

The Witness: \$20,000.00 per acre.

The Court: And as to the five acres?

The Witness: That would be \$12,000.00 per acre.

The Court: And as to the 40 acres?

The Witness: That would be \$5,000.00 per acre.

I might say this, too, Irl. You have been on this agriculture business and grazing land. If you want to classify it as agriculture and put grapes in there,

(Testimony of Benton Beckley.)

after three years, with an investment of \$12,000.00, it will net your figure easy, which they have been doing within twelve or eight miles of this same property, farther south, without any easements or rights-of-way, or anything, if you want to use it for agriculture or grapes.

Q. (By Mr. Brett): Did you not testify in the deposition I took on November 9th that the values of land in Palm Springs [56] had depreciated during the last couple of years?

A. There was a leveling-off period there, and that was due to the Korean War and different situations, building restrictions on swimming pools and golf courses, and things like that, and that has to be taken into consideration on today's value at the time of the sale.

Q. You did testify valuations had depreciated zero to 20 per cent?

A. That is today's market, in my judgment. That was not 1948. That was an approximate figure.

Q. You have been associated with these petitioners in various matters in connection with Palm Springs, haven't you? A. That is correct.

Q. You were assisting them in connection with their efforts to have certain allotments made?

A. I was in it before they came into it.

Q. And with your knowledge and consent, you were designated as a collecting agent to whom monies were to be paid for the use of lands allotted to or claimed for allotment by Indians that they represented?

(Testimony of Benton Beckley.)

A. There was never no collections made that I know of. They asked me one time, and I think served notices, but I don't believe, to my knowledge, that there was ever any monies collected.

Q. But you did agree to their making arrangements that [57] you be the collecting agent?

A. I would, yes, sir. I did the same thing for Lee Arenas, for Marcus Pete, through court, and I did collect for Lee Arenas at the time of his trouble with his wife, which was handled through the bank and an accounting made. I was bonded.

Mr. Brett: Will you mark this as Respondents' Exhibit C for identification?

The Clerk: Respondents' Exhibit C for identification.

(The document referred to was marked Respondents' Exhibit C for identification.)

Q. (By Mr. Brett): I will show you a photographic copy of a letter addressed to Jas. L. Bowers, P. O. Box #552, Palm Springs, Calif., dated December 28, 1948, signed by the name "Oliver O. Clark," and you recognize that as petitioner Clark's signature? A. That's right.

Q. And it contains a statement therein that——

Mr. Preston: You don't need to tell him what the letter is. Let him read it. It isn't in evidence, anyway. It is what somebody else wrote.

Q. (By Mr. Brett): There is a reference in there to making remittances to Benton Beckley, P. O. Box #1000, Palm Springs, California?

A. That is correct. [58]

(Testimony of Benton Beckley.)

Q. That is you? A. That is correct.

Mr. Brett: I offer this in evidence as Respondents' Exhibit C.

Mr. Preston: If your Honor please, he has already admitted that.

The Court: Have you any objection?

Mr. Preston: It doesn't make any difference. It is somebody else's letter.

The Court: Overruled. It may be admitted.

The Clerk: Respondents' Exhibit C in evidence.

(The document heretofore marked Respondents' Exhibit C for identification was received in evidence.)

Q. (By Mr. Brett): When did you last see any activity in real estate activities in Palm Springs?

A. I am still in it, but not working at it as a profession or trying to make a living at it. I do sell a few pieces off and on. I have sold a few in the last month. I am not active in real estate. I still retain my license and do some real estate business.

Q. You are familiar with the sale of a piece of property that is practically across the street from your property, aren't you?

A. It was not a sale. It was offered for sale and it has been held at that price, sir. [59]

Q. Where is that located?

A. That is on your State Highway 111, about two miles south and east of Palm Springs.

(Testimony of Benton Beckley.)

Q. How much is that acreage?

A. They are offering that at \$30,000.00.

Q. What is the amount of the acreage?

A. I don't know the exact amount. Around eight or nine acres. It runs back over the hill there, which is not in a definite set piece of acreage.

Q. It is from eight to nine acres of ground?

A. Eight to nine acres of ground at \$30,000.00.

Q. At \$30,000.00. For how long?

A. Just within the last month. Previously it was offered for \$42,000.00.

Q. For how long?

A. For about six to eight months.

Q. And that has frontage on this main highway,
111? A. That is correct.

Mr. Brett: That's all.

Redirect Examination

By Mr. Preston:

Q. Mr. Beckley, you were asked about the heart of the business district of Palm Springs. What in your opinion is the likelihood of that business area extending itself in all directions that are available? [60]

Mr. Brett: I object to that as not proper re-direct examination. I did not in any sense interrogate the witness as to his prognostications with reference to the business district.

Mr. Preston: But he has a right to fix his values, I think, in view of what he thinks are the potentialities.

(Testimony of Benton Beckley.)

The Court: Overruled.

The Witness: Palm Springs lies in an area which to the west is a mountain area, going straight up, and the only way the city can develop is to the east on Section 14.

Q. (By Mr. Preston): That is these Indian lands?

A. The Indian lands, and they have been held back by the restriction that the Department has put upon them. Even at that, they have gone ahead and the white people have made plenty of money over the Indian property and they are still making it over these Indian leases with the restrictions.

Mr. Brett: If the Court please, I move to strike the testimony upon the ground that it is in no manner responsive to the question. The question was, "What in your opinion would be the development of the business district?" and his answer was entirely directed——

The Witness: It would have to be——

The Court: Wait until counsel gets through.

Mr. Brett: His answer was with reference to certain alleged activities on the Indian reservation and did not in [61] any sense refer to or describe or define his conception or opinion.

The Court: Sustained.

Mr. Preston: As to all the answer, your Honor, or just part of it?

The Court: Not all of it.

Mr. Preston: He said the growth of the city would have to be in the direction of these lands.

(Testimony of Benton Beckley.)

The Court: That may remain. See if you can't straighten this out.

Q. (By Mr. Preston): Will you state your reasons for the statement in regard to your opinion with regard to the potentialities of Palm Springs in the matter of expansion?

A. It would have to be to the east of Palm Canyon Drive and Indian Avenue, due to the mountains on the west of Palm Springs.

Q. What, if anything, has been done toward the widening of Indian Avenue?

A. Maps were made, and laid out and surveyed. They were presented before, I believe, Congress, if I am not mistaken, or the Senate, some committee, for the widening of Indian Avenue to 100 feet. There has been a bond issue. The money is in the bank for the paving of Indian Avenue, but has been held up by the Department of Interior.

Mr. Brett: Just a minute. I move to strike that, if the [62] Court please. Naturally, I couldn't anticipate the answer. I move to strike it out as not the best evidence and as a conclusion of the witness.

Mr. Preston: He had a right as an expert witness to state what assumptions he made with reference to the widening of Indian Avenue.

The Court: What the Department has done——

Mr. Preston: How is that?

The Court: As to what the Department has done?

(Testimony of Benton Beckley.)

Mr. Preston: There has been an act of Congress, your Honor.

The Court: It may remain.

Q. (By Mr. Preston): What assumption, if any, did you make with reference to the removing of restrictions off of the Indian area?

A. At some date they would have to be removed——

The Court: Did you ask him as to what has been done?

Mr. Brett: No.

Mr. Preston: What I am trying to get at is, he has testified as to values, and I want to ask him what assumptions he used in making his opinion.

The Court: He may do that.

Mr. Preston: Is that permissible?

The Court: Yes.

The Witness: Through the growth of the city, it would [63] have to be to the east. Does that answer that? The business growth would have to go to the east on the reservation, Section 14.

Q. What assumption, if any, did you make with reference to the moving of the business property in the area?

A. With the widening of Indian Avenue, which will eventually have to be done, due to traffic conditions, the business area will be on Indian Avenue.

Q. Is it or is it not your opinion Indian Avenue would in such event become the principal street of the city?

A. It will in time.

Q. Has there been any sale of property zoned

(Testimony of Benton Beckley.)

on Indian Avenue within this business area that is described by counsel, that has been sold lately?

A. There has been one piece sold to Safeway. It was sold to a company, and the reported price is around \$108,000.00 for 50 feet on Indian Avenue through to Palm Canyon, with 100 feet on Palm Canyon. That price, I haven't checked, but that is generally stated among the real estate men in Palm Springs.

Mr. Brett: I move to strike that, if the Court please, on the ground that by no possible consideration could it be competent to any of the valuations which are admissible in this case. His description of it is of a business area zoned for business, which he previously described. The nearest of any of these properties to the business area is 528 [64] feet. The other properties are a mile and a quarter or a mile and a half away from it. Any property, if the Court please, that would be of an entirely different character from its permitted use and in an entirely different location, would not be competent under any circumstances.

It would be just the same as permitting in evidence some transaction with reference to land in Los Angeles or land at some other place.

If it is zoned entirely different, as he testified, that is business property, and it is within the area he described, it is at least 528 feet from the two-acre parcel, and a mile and a quarter from any other parcel. I submit this should be stricken.

Mr. Preston: A witness who is an expert on

(Testimony of Benton Beckley.)

values makes up his opinion on the sale and purchase of other property in the vicinity. This property is 528 feet from our property, the two-acre tract in Section 14. He has already testified that the city, in his opinion, will have to move in that direction, that this area will have to be classified as a business area, that he assumed, in making up his opinion of values, these facts to exist, and I am asking him if it is not a fact that a sale has been made of business property within 528 feet of this property.

Mr. Brett: Your Honor, may I ask him one question on voir dire before you rule? [65]

The Court: Yes.

Voir Dire Examination

By Mr. Brett:

Q. Mr. Beckley, when in point of time did you believe that Indian Avenue was going to be widened and that Section 14 was going to be rezoned as business property?

A. As far as rezoning, Irl, I can't say anything on that, because I don't know, but I know on zoning, and you have been hitting that pretty strong, there have been variances made in the zoning. There are three in the papers right now for the Indian reservation. There is one from a golf-driving links to a trailer park. So the zoning I do not take into effect too much.

Now, the other question, the widening there, that

(Testimony of Benton Beckley.)

has come up in Palm Springs for the last seven or eight years and they are still trying to figure out a way to take care of the traffic. If you were in the town last week end, you couldn't get on the main street.

Q. My question was when.

A. That has been for the last five or six years under consideration.

Q. When do you think that is going to take place?

A. I couldn't tell you that, Irl. That is up to the Department.

Q. Up to the Government, you mean? [66]

A. That is my opinion.

Mr. Brett: Then I renew my objection. Certainly, it would be incompetent to consider on the theory of something that he can't prognosticate even in an opinion as to the time when it would take place. His opinion would be dependent upon the action of some other body that certainly the Indian couldn't control.

The Court: Sustained.

Redirect Examination

(Resumed)

By Mr. Preston:

Q. Mr. Beckley, take the property known as the five-acre tract, south of the Palm Springs business district. What is the nature of the development on the west from that property?

A. The west is the very highest dwellings,

(Testimony of Benton Beckley.)

finest people; your Bank of America man, Gianini, and all of them, live in that locality.

There is, also, in that area, in the south part, the Del Monte, and hotels of the finest quality.

Q. When you spoke a while ago of lots having been sold over there do you know the price of the lots in that area?

A. There have been lots up to this 1948 period from \$1,800.00 to \$3,400.00, small lots. I would say they would run four to five lots to an acre, according to the size.

Q. Run what?

A. The lots in size would run four to five to an acre. [67]

Q. And they run to what prices?

A. \$1,800.00 to as high as \$4,500.00 and \$4,700.00.

Q. What is the distance between that location and this tract?

A. Just the street between them.

Q. Take the 40-acre tract. Has there been any development near it?

A. There has been development in the last three to five years. There has been the Hotel Biltmore built within 1,300 feet, which is valued at over a million dollars.

Q. La Plaz was sold within a year and a half ago for \$365,000.00, within 1,320 feet of it.

You have your Deep Well Ranch which fronts on your highway, but the main buildings set

(Testimony of Benton Beckley.)

back, close to 500 feet, with an approximate value of over a half million dollars.

Q. Are these factors you took into consideration?

A. That's right. To the west of that, there are subdivisions, motels and hotel units.

Q. And the real estate market is brisk or dull?

A. It is dull now due to restrictions on building.

Q. In 1948, what about it?

A. It was fairly good, fairly active. There was a little spurt in September and October. There was quite a few sales made. Since that time it has slackened off.

Mr. Preston: I think that's all, unless my associate has [68] something more.

Recross-Examination

By Mr. Brett:

Q. This area that is immediately across Palm Canyon Drive, where you stated there were certain lots sold, is unrestricted in the sense it has no Indian restrictions on it?

A. That is correct.

Q. It is white-owned land?

A. That is correct.

Q. When did you assume the restrictions on the five-acre and 40-acre pieces would be removed?

A. I have no idea.

Q. You have no idea? A. No.

Q. Whether it would be one year or ten years?

A. That is correct.

(Testimony of Benton Beckley.)

Q. These hotels you referred to, when you gave values of one million dollars and so forth, you mean after they had been improved?

A. That is correct.

Q. You are not talking about the fact that the land sold for any price like that?

A. Your land would be approximately half the value I appraised them at. That is what they are determined by.

Q. Those lands are also unrestricted, white-owned lands? [69]

A. That is correct.

Mr. Brett: That's all.

Mr. Preston: That's all.

The Witness: May I be excused to leave now? I have got a long way to go.

Mr. Brett: I am through with him.

Mr. Preston: I dislike to see you go, but it's all right.

The Court: They say you can go.

The Witness: Thank you.

(Witness excused.)

Mr. Preston: We offer in evidence, if your Honor please, and solicit a stipulation from counsel that this document is a map of Section 14 and at least official or semi-official, being the map that was used by the Government in the matter of allotments of the Palm Springs Indians in Section 14. It shows the relative position of the lands in question here and the streets that we claim, or easements, rather, that exist on the official map that were not

in Exhibit A. We ask that that be received in evidence as our Exhibit No. 9.

Mr. Brett: It is stipulated it may go in evidence, your Honor. We have no objection.

I want to make it clear Exhibit A and Exhibit B are purely for illustrative purposes. In so stipulating to this last, I do not stipulate that those streets are in place that are shown there or that they are dedicated. [70]

I do stipulate that that is a correct reproduction of a grid drawing, which was prepared by the Indian Department and which was used in connection with the allotment program.

Mr. Preston: The allotments were made with reference to these easements noted on this map.

The Court: It may be admitted without objection, then.

The Clerk: Exhibit 9 in evidence.

(The document referred to was marked Petitioners' Exhibit No. 9 and received in evidence.)

Mr. Preston: We have also a composite map we have shown counsel, which shows all three of the pieces of property involved in this litigation and their relative position toward each other, and for illustrative purposes we would like to have that received in evidence. It is a better display of the true situation all in one composite sheet than we have in these other two sheets. It has got the word "Brown" on it where Brown exists. Where the

word "Adjudicated" appears, it is both Brown and Lee Arenas.

The Court: It may be admitted and received in evidence.

The Clerk: Petitioners' Exhibit 10 in evidence.

(The document referred to was marked Petitioners' Exhibit No. 10 and received in evidence.)

Mr. Preston: Your Honor, we have one other witness, but, as I explained to the court yesterday, he is testifying as an expert in Santa Ana, and my information is he can't be here [71] until 2:00 o'clock, but Mr. Brett said he will take over and put in some of his case, if the court wants to hear it.

The Court: Very well.

Mr. Brett: Is that satisfactory with your Honor?

The Court: Yes, that is satisfactory.

Mr. Brett: Mr. Evans.

BERNARD G. EVANS

called as a witness by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Bernard G. Evans.

Direct Examination

By Mr. Brett:

Q. Mr. Evans, you testified in this same proceeding in October, 1948? A. Yes.

(Testimony of Bernard G. Evans.)

Q. Where do you reside?

A. San Bernardino, California.

Q. What business are you engaged in?

A. Real estate broker, real estate appraiser and subdivider.

Mr. Preston: I will stipulate that his qualifications given at the other hearing may be considered as a part of this testimony.

Mr. Brett: That is acceptable. That is contained, if [72] the Court please, in Petitioners' Exhibit 8.

Mr. Preston: Beginning on page 251.

Q. (By Mr. Brett): Upon my direction, did you revisit Palm Springs within the last two weeks for the purpose of inspecting these properties since they have been trust-patented? A. Yes.

Q. And did you take any pictures of the properties and their surroundings?

A. Yes. I took quite a few last week. I took some prior to that time and some in 1948.

Q. Did you make any further investigation in the way of consulting with others and interviewing others regarding information as to the developments in Palm Springs and the status of the market?

A. Yes, I did. I spent a day and a half in Palm Springs about three weeks ago, and I spent Monday afternoon and all day Tuesday of last week refreshing my memory on these properties, and contacting properties, property owners, subdividers and businessmen of Palm Springs.

Q. Were you informed, as distinguished from

(Testimony of Bernard G. Evans.)

the situation which existed in 1948, at which time portions of these properties were subject to what is known as revocable permit, the trust patentee could now execute firm five-year leases for business purposes? [73] A. Yes.

Q. Did you inform yourself as to the text and contents of the existing zoning ordinances of the City of Palm Springs? A. Yes.

Q. Will you state briefly whom you interviewed on this last investigation with regard to informing yourself about the status of the market in the Palm Springs area?

A. I called on Mr. Fred Ingram, whom I have known for many years, who is the vice-president and manager of the Bank of America in Palm Springs.

I called on Mr. Raymond Cree, who is a real estate broker and formerly represented my firm in Palm Springs in 1925; and Mr. Culver Nichols, who is a real estate subdivider and developer and has been, I think, for some twenty years past.

I talked to John W. Williams, subdivider, property owner, and developer, real estate broker who has been in Palm Springs I believe, for 25 years; Billy Wright, who is a broker and an officer of the Coachella Valley Savings and Loan Association.

I called again on Mr. Perdew, the local agent of the Indians at Palm Springs, and Mr. Peter Sheptenko, who is a broker and property owner in Palm Springs.

Also Mr. Harold Hicks, with whom I have been

(Testimony of Bernard G. Evans.)

acquainted for some twenty years last past, and an active property owner, broker and developer in Palm Springs.

I also called on Mr. G. M. Minturn, city engineer of Palm [74] Springs, and Mr. Woodman, who is the director of the City Planning Commission of the City of Palm Springs, and a number of other brokers, salesmen, whose names I do not now recall, but principally in the offices of these brokers that I have enumerated.

Q. And did you find that the Chamber of Commerce of the City of Palm Springs had issued a map which was being used by various brokers there as the map of Palm Springs? A. Yes.

Mr. Brett: Will you mark this as Respondents' Exhibit D for identification?

The Clerk: Respondents' Exhibit D for identification.

(The map referred to was marked Respondents' Exhibit D for identification.)

Q. (By Mr. Brett): Is this map which I show you, and which has been marked Respondents' Exhibit D for identification, such a map?

A. Yes. I am not sure who publishes it. I think it is issued by the Chamber of Commerce and sponsored by the various business firms in town.

Q. This particular one was sponsored by Culver Nichols, one of the men you interrogated?

A. Yes.

Q. It shows, among other things, some of his

(Testimony of Bernard G. Evans.)

developments in the area, which are surrounded by a red border and [75] by lettering and by designated symbols? A. Yes.

Q. And you investigated those properties, as well as others, in your investigation?

A. Yes. I mean I am very familiar with a good many of those properties, and many of those were developed by Mr. Nichols' father-in-law, O. T. Stevens, who is one of the real old-timers of Palm Springs.

Mr. Brett: I will offer this in evidence as Respondents' Exhibit D.

The Court: Admitted.

The Clerk: Respondents' Exhibit D in evidence.

(The map heretofore marked Respondents' Exhibit D for identification was received in evidence.)

Q. (By Mr. Brett): Now, Mr. Evans, you were informed that we desired that you determine a value as of the present date, as well as the value which you had theretofore given? A. Yes.

Q. And until the court had ruled upon the matter, we desired you fix a value both of a fee simple, which would be free of all restrictions, as far as the Indian is concerned, as distinguished from zoning restrictions, and a value of the Indian's interest in the property under her trust patent?

A. Yes.

Mr. Brett: Mr. Clerk, will you mark these vari-

(Testimony of Bernard G. Evans.)

ous [76] photographs seriatim by the next letters for identification?

The Clerk: Respondents' Exhibits E and F for identification, photographs.

(The photographs referred to were marked Respondents' Exhibits E and F, respectively, for identification.)

Mr. Brett: In order to go along and save time, your Honor, may I proceed with these first photographs while the clerk is marking the others, and have him announce the identification letter when I take each one?

The Court: Yes.

Q. (By Mr. Brett): I will show you a photograph, which has been marked Respondents' Exhibit E for identification. Did you participate in the taking of that photograph?

A. Yes, I took the photograph.

Q. Where did you take that photograph, and when?

A. This was taken from a dirt road which runs north and south through Parcel 50, the two-acre parcel, Parcel 50.

Q. That is the two-acre parcel?

A. In a north direction.

Q. Is that a fair portrayal of the conditions that existed at the time you took the picture?

A. As to that portion of the property, yes.

Q. On what date was that?

(Testimony of Bernard G. Evans.)

A. That was taken on last Tuesday, a week ago today, the 22nd. [77]

Q. November 22, 1950? A. Yes.

Q. And is that substantially a fair portrayal of the conditions as they existed when you were on the property in October, 1948?

A. Yes. There has been very little change since 1948.

Mr. Brett: I will offer this in evidence as Exhibit E.

The Court: Admitted.

The Clerk: Respondents' Exhibit E in evidence.

(The photograph heretofore marked Respondents' Exhibit E for identification was received in evidence.)

Mr. Brett: Does your Honor desire to have these passed up to you, or do you want to examine them later?

The Court: It doesn't make any difference.

Mr. Preston: I would like to make a statement, and after I make that statement I don't care if they are admitted or not.

This Section 14 is covered with shacks. That is admitted and no one disputes it. But it is not proper to consider that this is the result or action that has followed the trust patents. The trust patents have not been issued, your Honor, yet. There are many conflicts in them, and there is an over all lawsuit pending in this court now for the correction and the adjudication of the allotments. There has

(Testimony of Bernard G. Evans.)

been no opportunity for the Indians, or for anybody else, to improve the allotments since the allotments were made. These were the [78] conditions that the Government itself suffered to exist on this property and shouldn't be to the prejudice of these petitioners or to the prejudice of anybody, unless it is the United States Government.

Mr. Brett: Your Honor, these are offered for illustrative purposes so that both you and any reviewing court, if there is one, can have a picture, since, as you inform me, you can't very well make the trip to Palm Springs.

The Court: This one may be admitted in evidence.

Mr. Brett: I will go rapidly through the others in view of Judge Preston's statement, but I do want something in the record so they can be identified.

Q. I show you next Respondents' Exhibit F for identification. Did you take that photograph?

A. I did. That was taken the same day as the other. It was either Monday or Tuesday. I took some Monday afternoon and some Tuesday morning.

Q. Where was it taken?

A. This was taken near the southeast corner of Parcel 14, looking north along the east boundary.

Q. Of what?

A. Parcel 50, and farther along Parcels 46 and 47 to the north.

Q. Those are the parcels which are illustrated

(Testimony of Bernard G. Evans.)

on the respondents' exhibit which has been received in evidence as [79] Exhibit A?

A. That is correct, yes.

Mr. Brett: I will offer F in evidence.

The Court: It may be admitted.

The Clerk: Exhibit F in evidence.

(The photograph heretofore marked Respondents' Exhibit F for identification was received in evidence.)

Q. (By Mr. Brett): Now I will show you Exhibit G, a photograph, that is an exhibit for identification. Did you take that photograph?

A. I took that. Either I, or I was present when it was taken.

Q. When was that taken?

A. That was taken in 1948, just prior to this former hearing on this case. It was taken from the easterly portion of Parcel 41, which is the five-acre parcel, looking in a northwesterly direction, and showing the cottages along the north line of that parcel.

Q. So that we can orient it with other exhibits, I refer you to the drawing which has been received in evidence as Respondents' Exhibit B, and I will ask you if the parcel this refers to as 41 is the small parcel colored in red and having the designation in a capital letter "E" as it appears on Exhibit B?

A. Yes, that is correct. [80]

Q. Is that a fair portrayal of the conditions as they existed as of that date? A. Yes.

(Testimony of Bernard G. Evans.)

Q. Did you return to the property in your recent investigation?

A. I returned to the property last week and three weeks ago.

Q. Is it a fair portrayal of the conditions existing as of that time?

A. Yes, with this alteration, that there has been quite a little dirt removed from this parcel and placed on land on the west side of Indian Avenue. There has been some grading in there, but arrangements—I do not know what arrangements were made, but dirt was removed. It is more level today than it was.

Mr. Brett: I will offer Respondents' Exhibit G in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit G in evidence.

(The photograph referred to was marked Respondents' Exhibit G and received in evidence.)

Mr. Brett: With your Honor's permission, I want to go back to this F for just one minute.

Q. I failed to ask you, Mr. Evans, if that was a fair portrayal of the conditions existing in November of this year [81] and October, 1948, as shown in Exhibit F?

A. Yes, with the exception some of the brush is gone.

Q. I am not talking about the last picture.

A. Yes.

(Testimony of Bernard G. Evans.)

Q. Next I will show you Exhibit H for identification, a photograph. Did you take it?

A. Yes, I took that.

Q. And when? A. Last week.

Q. And where was it taken?

A. That was taken on the two-acre parcel immediately north of Lot 50.

Q. That is the one that is shown as 47 in blue on Respondents' Exhibit A?

A. That is correct, on the dirt road which runs through the property, runs through 50 and through 47.

Q. Is that a fair portrayal of the conditions as they existed at the date of the picture?

A. Yes.

Q. And also as they existed in October, 1948?

A. Yes.

Mr. Brett: I offer Respondents' Exhibit H in evidence.

The Court: Admitted.

The Clerk: Exhibit H in evidence.

(The photograph referred to was marked Respondents' Exhibit H and received in evidence.) [82]

Q. (By Mr. Brett): Next I will show you a photograph, which is Exhibit I for identification, and which is both a photograph of a person and of an area. Was that picture taken at a time when you were present?

A. The photograph is of me, taken by Mr.

(Testimony of Bernard G. Evans.)

Jones. It is close to the southwest corner of Parcel 50.

Q. Mr. Jones is Mr. Donald C. Jones?

A. Yes.

Q. When was that taken?

A. That was taken in 1948.

Q. Parcel 50 is which area?

A. That is the five-acre parcel.

Q. Parcel 50?

A. I beg your pardon. I am wrong. This is the two-acre parcel.

Mr. Preston: 50 is the two-acre parcel?

The Witness: Yes.

Q. (By Mr. Brett): Is this a fair portrayal of the conditions as they existed on that date?

A. Yes.

Mr. Preston: I will stipulate these are all fair portrayals of whatever you say they are, and you can put them in.

Mr. Brett: On both dates?

Mr. Preston: Any day.

Mr. Brett: I will accept the stipulation. [83]

The Court: Very well.

Q. (By Mr. Brett): That is true, isn't it, Mr. Evans? A. Yes.

Mr. Brett: We will offer Exhibit I in evidence.

Mr. Preston: Just state what they are, that's all that is necessary.

The Court: Admitted.

The Clerk: Respondents' Exhibit I in evidence.

(Testimony of Bernard G. Evans.)

(The photograph referred to was marked Respondents' Exhibit I and received in evidence.)

Mr. Brett: I can't say what they are. I will have to ask the witness to do that.

Mr. Preston: All right.

Q. (By Mr. Brett): I will show you Respondents' Exhibit J for identification. Did you take that photograph?

A. Yes, that is a picture I took.

Q. Who is the person in the picture?

A. Mr. Jones is in the middle distance.

Q. When did you take that?

A. That was taken in 1948?

Q. And where?

A. It is looking north from the approximate south line of the five-acre parcel marked "Parcel E" in Exhibit B.

Q. The five-acre parcel, which has some frontage on Palm Canyon Drive? [84] A. Yes.

Mr. Brett: We will offer Respondents' Exhibit J in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit J in evidence.

(The photograph referred to was marked Respondents' Exhibit J and received in evidence.)

Q. (By Mr. Brett): Next I will show you a photograph marked Respondents' Exhibit K for identification. Were you present when that picture was taken? A. Yes.

(Testimony of Bernard G. Evans.)

Q. Your picture is in it? A. Yes.

Q. And who took the picture?

A. Mr. Jones took the picture.

Q. When was it taken?

A. Taken in 1948?

Q. And where?

A. Taken from South Palm Canyon Drive, looking northeasterly across and over into the 40-acre parcel. It is taken some distance away. This is showing the general terrain, which characterizes the 40-acre parcel and the 5-acre parcel at the time.

Q. Those are in Section 26? A. Yes. [85]

Q. And are portrayed in red and indicated by the capital letter "E" on Exhibit B?

A. Yes.

Mr. Brett: I offer K in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit K in evidence.

(The photograph referred to was marked Respondents' Exhibit K and received in evidence.)

Q. (By Mr. Brett): Next I will show you Respondents' Exhibit L for identification.

A. That is a photograph taken by me in 1948, looking easterly in Section 26, showing a dirt road about the middle of the west half of the section, and looking out across the center line of the section to the east and slightly to the north, showing the general character of the land in the 40-acre parcel.

Q. That has Mr. Jones' picture in it?

(Testimony of Bernard G. Evans.)

A. Yes.

Mr. Brett: I offer Respondents' Exhibit L in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit L in evidence.

(The photograph referred to was marked Respondents' Exhibit L and received in evidence.)

Q. (By Mr. Brett): I will next show you Respondents' Exhibit M for identification and ask you what that is? [86]

A. M is a scene in the central street, that is, the street which runs through Parcels 50 and 47 and 46, and it is actually a scene in Parcel 46, to the best of my recollection.

Q. That is to illustrate the environment immediately surrounding 50?

A. It shows the character of the improvements, yes.

Mr. Brett: I offer Respondents' Exhibit M in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit M in evidence.

(The photograph referred to was marked Respondents' Exhibit M and received in evidence.)

Mr. Brett: This will be the last I will offer before noon, your Honor. I have other evidence for the afternoon.

(Testimony of Bernard G. Evans.)

Q. I now show you Exhibit N for identification and ask you the same question.

A. This is taken on the existing dirt road which marks the east boundary of Parcel 50, and was taken from about the north line of 50, looking along the east line of Parcel 47.

Mr. Brett: We offer Respondents' Exhibit N in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit N in evidence.

(The photograph referred to was marked Respondents' Exhibit N and received in evidence.)

Mr. Brett: Now, your Honor, being 12:00 o'clock, do you desire to proceed? [87]

The Court: We will take our recess at this time.

Mr. Preston: Will we get through today?

Mr. Brett: I am not going to be too long with this witness.

The Court: We will recess until 2:00 o'clock. I know how long it takes you.

(Whereupon, at 12:00 o'clock noon, Tuesday, November 28, 1950, a recess was taken until 2:00 o'clock p.m. of the same day.) [88]

November 28, 1950—2:00 P.M.

The Court: Proceed.

The Clerk: I have marked five more photographs for identification as Respondents' Exhibits O, P, Q, R, and S.

(The photographs referred to were marked Respondents' Exhibits O, P, Q, R, and S, respectively, for identification.)

Mr. Preston: Do they show what they are on the back of them?

Mr. Brett: I will have the witness testify to that.

Mr. Preston: We will admit them.

Mr. Brett: I want the testimony.

BERNARD G. EVANS

called as a witness by and on behalf of the respondents, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Mr. Brett:

Q. Now, Mr. Evans, in reconsidering this matter, have you arrived at an opinion as to the fair market value of the fee of the two-acre tract as of the present date? A. Yes.

Mr. Preston: To which we object upon the ground that the date is 1948, and this witness is already on the record with his opinion as of that date. [89]

(Testimony of Bernard G. Evans.)

The Court: Well, he can ask him also now, can't he?

Mr. Preston: Do you want to hear it as of this date, also?

The Court: Yes. He can do it.

Q. (By Mr. Brett): What is that opinion, Mr. Evans? A. \$12,500.00.

The Court: An acre?

The Witness: For the parcel.

The Court: For the two acres.

Q. (By Mr. Brett): How much for the two acres? A. That is the two acres.

Q. How much per acre, then?

A. As of that, \$6,250.00.

Q. Just what factors did you consider in arriving at that opinion?

A. The present situation of the property as it exists today; the circumstances governing the area as a whole; the type and character of near-by development and adjacent development; the amount of property which is available within the City of Palm Springs and which has been available for some time; the development of the city; the history of the community; all of the factors which, in my opinion, go to make up or affect the value of real estate. There is the zoning——

Q. Just a moment. There are some parts of your answer I did not get. I would like to have the reporter read it. [90]

(The answer was read by the reporter.)

(Testimony of Bernard G. Evans.)

Q. (By Mr. Brett): Now, among other things, did you consider transactions which you deemed to be comparable or partially comparable?

A. Yes, sir.

Q. Are there any to which you particularly referred in reference to the two-acre tract?

A. In addition to those, I think, which we went into two years ago, there was a sale earlier this year of a 10-acre parcel which is one-quarter of a mile south and approximately one-quarter of a mile east of this parcel on the south side of Ramon Road.

Q. I show you Respondents' Exhibit D. Does that cover an area so you can show where it is located?

A. Yes.

Q. Do you have a colored pencil?

A. Yes.

Q. Will you place on the map, which is Exhibit D, the location of the property which you have just referred to?

A. (Witness complying): It is on the south side of Ramon Road, just east of the center line of the section, with a frontage of 330 feet on Ramon Road, running through the one-quarter mile, with an equivalent frontage of 330 feet on the north side of Sunny Dunes Road.

Mr. Preston: May I make an inquiry? I don't understand [91] what this is. What is it you are claiming of this?

Mr. Brett: This is a transaction which he considered in part comparable to this acreage in fixing value.

(Testimony of Bernard G. Evans.)

Q. Is that correct, Mr. Evans? A. Yes.

Mr. Preston: If your Honor please, I haven't objected thus far, but I don't think an expert on values can be cross-examined like this, except on cross-examination of counsel, can he?

The Court: I can't follow you on that. He is an expert and he is subject to cross-examination upon any matter, circumstance or fact that has any relevancy to his opinion.

Mr. Preston: I am talking about his direct examination. May he, on his direct examination, go into specific sales?

The Court: Yes.

Mr. Preston: If that is the ruling, it is all right with me, but that was not the rule when I was younger.

The Court: It is the rule ever since I have been on the bench in these condemnation cases.

Q. (By Mr. Brett): Mr. Evans, was that an actual sale? A. That was an actual sale.

Q. From whom did you obtain the information about the sale?

A. I obtained the information on that sale from Mr. Sheptenko, who is the broker who made the sale. I first [92] obtained it from a third party, John Williams, a broker. Then I ran down the information and confirmed it from Mr. Sheptenko, who was the broker who made the sale.

Q. The actual broker? A. Yes.

Q. Did you go to the site and examine the property? A. I did.

(Testimony of Bernard G. Evans.)

Q. Did you learn to whom the sale had been made and the price? A. Yes.

Q. And the amount of acreage? A. Yes.

Q. When was the sale made?

Mr. Preston: To which we object on the ground it is hearsay and this witness couldn't testify to anything but hearsay.

The Court: As to when the sale was made, unless he knows directly, you are correct. That would be hearsay unless he knows.

Q. (By Mr. Brett): What was the price at which the sale was made?

Mr. Preston: To which we make the objection it is hearsay, unless he knows. [93]

The Court: Sustained.

Mr. Brett: I am not arguing with your ruling, but I am merely getting information. Is it your Honor's ruling I would have to produce here a buyer or seller? Knowledge couldn't come otherwise.

The Court: I am not telling you what you should do. I am just saying that is hearsay unless he has actual knowledge that the sale occurred for so much.

Mr. Brett: I recognize that, but I am trying to find in my mind what actual knowledge would be.

Q. You yourself interviewed one of the participating parties, the broker that made the sale or the transaction, is that right? A. Yes.

Q. And you learned from that broker the name of the purchaser, did you? A. Yes.

(Testimony of Bernard G. Evans.)

Q. The amount that was paid? A. Yes.

Q. The amount of property involved in acreage?

A. Yes.

Q. And the price paid? A. Yes.

Mr. Preston: I object to all those questions on the ground that they only emphasize the fact that it is just [94] hearsay.

The Court: Overruled. Maybe he is leading up to it. I don't know.

Q. (By Mr. Brett): Mr. Evans, as a result of the information thus gained and in the manner just stated, will you state the date of the sale?

Mr. Preston: To which we object on the ground it is hearsay evidence as to when the sale took place.

The Court: It would be hearsay. Sustained as to the date of the sale. I understand the rule to be, when one goes on the stand and testifies to value of real estate, he can do so if he actually knows that the transaction took place, himself, and what it brought, not what people in the community say, because everyone could say that the sale was made and say what it brought. The rule is confined to actual knowledge of sales in the community of similar property during a similar period, and the amount. That is the fundamental rule.

Mr. Brett: I am not either arguing with your Honor or disputing the rule, but I think you have drawn it too close. This is direct knowledge. Otherwise, the owner himself would have to come in.

(Testimony of Bernard G. Evans.)

The Court: No, I don't say that. Can't you bring in those who told him that?

Mr. Brett: The broker?

The Court: The man that carried on the transaction. [95] When you get right down to it, the man who consummated the transaction is the one who testifies directly to the point. I think that is the rule, gentlemen.

Mr. Brett: On that basis, I can't bring out the additional facts.

Q. That information which you obtained in the manner you describe is a part of the information you used in fixing the value of the two-acre parcel, is that correct? A. That is correct.

Q. You referred to the present situation in reference to this area. What did you have in mind there, so that the court can understand what you considered?

A. Physically, the physical terrain, the type and character of development. In other words, what is there on the ground.

Q. Tell us what you mean by that, so that the court can in his mind understand what you considered.

A. That part of Section 14 is what I would characterize as a fourth or fifth rate residential area. It is almost a slum area. It has grown up like the proverbial Topsy, with shacks and little houses and rather a typical low, extremely low quality residential district, such as to be found on the fringes or in the slum areas of any community.

(Testimony of Bernard G. Evans.)

Until recent months there has been no effort, in my opinion, made to control the development at all. There are [96] no paved streets. The streets aren't even where they are supposed to be. That is, there is a layout of that, a layout which had been made by the Indian Office, but in many cases the houses are in the middle of the street. The houses that are supposed to be on certain allotments are not. They are either sitting on the line or sitting out in the middle of the street. There is no sewerage in the area.

Q. No sewerage in the area at all?

A. No, not inside Section 14. There is a sewer on Indian Avenue. It is now, and as of this date, within the city limits of Palm Springs and subject to the building and zoning ordinances and general control ordinances of the City of Palm Springs. There are no dedicated streets within the section. By "dedicated," I mean dedicated for public use and accepted by any governmental body for maintenance.

Mr. Brett: I am going to interrupt just a minute, if I may. I understand Judge Preston has no objection to these two offers. I want to offer in evidence a copy of an act of Congress, Public Law 322, 81st Congress, Chapter 604, First Session. The court, of course, can take judicial notice, but in order that you have the facts, I want to make the offer here.

The Court: There is no objection?

Mr. Brett: It is an act which directly refers

(Testimony of Bernard G. Evans.)

to and describes the Palm Springs Reservation and, among other things, [97] makes the reservation amenable to the laws, both health and zoning, of the City of Palm Springs.

Mr. Preston: And also provides for the widening of Indian Avenue.

Mr. Brett: It authorizes it.

Mr. Preston: It authorizes the widening of Indian Avenue.

The Court: It may be admitted.

The Clerk: Respondents' Exhibit T in evidence.

(The document referred to was marked Respondents' Exhibit T and received in evidence.)

Mr. Brett: Then I also desire to offer at this time a certified copy, certified by the City Clerk of the City of Palm Springs, which is a city organized under the laws of the State of California, of the zoning ordinances, and the map illustrating the land uses which can be made in the City of Palm Springs, including the Indian lands in the Indian reservation, as Exhibit U.

The Court: It may be admitted.

The Clerk: Respondents' Exhibit U in evidence.

(The document referred to was marked Respondents' Exhibit U and received in evidence.)

Q. (By Mr. Brett): Mr. Evans, you are familiar with that zoning ordinance that I just referred to? A. Yes.

(Testimony of Bernard G. Evans.)

Q. You have considered that in fixing your valuation? [98] A. Yes.

Q. And what zoning regulations affected this parcel or this two-acre piece?

A. This is in Zone R-1-A.

Q. What are the limitations of Zone R-1-A?

A. That is a single-residence zone which provides a minimum ground area of 7500 square feet per dwelling.

Mr. Preston: May I have that answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Brett): Do the present structures which are now existing and have been in place upon the two-acre parcel conform to that ordinance?

Mr. Preston: To which we object on the ground it is immaterial. We admit they are not.

Mr. Brett: I will stipulate with you they do not.

Mr. Preston: And we are not talking about that at all.

Mr. Brett: I understand the court will accept the stipulation?

The Court: Yes.

Q. (By Mr. Brett): Mr. Evans, did you consider, among other things, what would be the effect of such a thing as a fire or some other destruction of the present existing structures upon the use of the property?

Mr. Preston: To which we object as incompetent, irrelevant, and immaterial. It presupposes

(Testimony of Bernard G. Evans.)

this property is [99] going to remain shacks all the rest of their lives, when the property is just now being allotted, and what will become of it is mere speculation from this witness' standpoint. I don't see how it could affect the value at this time if they might have a fire and burn out the shacks. Maybe it would be the best thing that ever happened to the town, if they did.

Mr. Brett: Your Honor, I will indicate for the record what I am offering it for, but my question was merely whether he considered it. But I do want to show the witness considered the fact that, while the non-conforming use is lawful now, under the zoning law, if there should be any destruction, whoever would use the property would have to conform to the zoning ordinance and could no longer put it to the present use, which provides a multiple income as distinguished from a single residence. I think that is proper to show.

The Court: The objection is overruled. You may go ahead.

Q. (By Mr. Brett): Do you have the question in mind?

A. Yes. I have given consideration to those possibilities.

Q. What consideration did you give to that fact?

A. This, that should existing improvements in considerable areas of Section 14 be destroyed by fire, under the present ordinance they could not be replaced as such.

Mr. Preston: Do you refer to the provisions

(Testimony of Bernard G. Evans.)

of the ordinance just introduced in evidence? [100]

The Witness: Yes.

Q. (By Mr. Brett): What does it say about rebuilding?

A. New construction, I am speaking of, within Palm Springs.

Q. What kind of restrictions would there be on new construction?

A. They would have to comply to the present Palm Springs residential building code, which is very similar to the uniform Building Code of the State of California.

Q. In other words, there would have to be a single residence on each—how many feet?

A. 7500 square feet.

Q. 7500 square feet.

A. That is one provision, and the other is just the usual building code types of construction.

Mr. Preston: It would be in the interest of the petitioner to go down with a match and start a fire. [101]

Q. (By Mr. Brett): Did you give consideration to the use which was being made of the properties which were immediately surrounding the two acres? A. Yes.

Q. What consideration did you give to that as to its effect on the value of these two acres?

A. That environment always inevitably casts its reflection on any property that is under consideration, and inevitably has an effect on value, probably.

(Testimony of Bernard G. Evans.)

Q. Did you consider it would have any effect upon the development of the two acres that it was surrounded by this——

A. To this extent, that the possible development of the two-acre parcel is of necessity tied in with the possible development of surrounding contiguous nearby land. Two acres standing alone is isolated and could not be developed to advantage, to a higher and better use, unless adjacent and contiguous and surrounding properties were so improved.

Q. Did you assume that the purchaser of this two acres would have any right to control, change, or modify the use of surrounding lands immediately adjacent to it?

A. No, I don't believe I did.

Mr. Preston: What was the answer?

The Witness: I don't believe I did.

Q. (By Mr. Brett): Did you form an opinion as to the [102] present day, that is, today's fair market value of the five-acre parcel?

A. I have.

Q. As in fee? A. I have.

Q. What is that opinion? A. \$32,500.

Q. And that is how much an acre, Mr. Evans?

A. Mathematically, that is \$6,500 an acre.

Q. Mr. Evans, did you consider that there were any transactions in the area which you deemed to be comparable to that five-acre piece?

A. None exactly comparable. I took into consideration the sale of this 10 acres, to which I have

(Testimony of Bernard G. Evans.)

previously made reference, on the south side of Ramon Road. Also the sale of individual lots on Sunny Dunes Road made during this year, part of the Trousdale development of several hundred acres, a half mile north.

Q. What was the nature and character of that property, as you saw it? A. The five acres?

Q. Yes.

A. At the extreme north line, there are four or five small frame cottages and cabins. The greater part of the five acres is and has been undeveloped land. It is land with [103] typical desert type of brush, except a part of it has been cleared, as I stated this morning, or there appears to be some dirt removed and carried across to the other side of the highway. It has a frontage 330 feet on Ramon Road and a depth of 660 feet.

Mr. Preston: Is this the five acres?

The Witness: Yes.

Mr. Preston: That isn't on Ramon Road, is it?

The Witness: I beg your pardon. On South Palm Canyon Road.

Mr. Preston: Palm Canyon Drive.

The Witness: Palm Canyon Drive. I stand corrected. It has domestic utilities, gas, water, and electricity. It also has water running through it, an Indian line, part of the old so-called irrigation land, of which little use is now being made of that water, inasmuch as adequate water is now available from the city system, and it is bounded on the south and on the east by undeveloped desert land.

(Testimony of Bernard G. Evans.)

Across the street, on the west side of Palm Canyon Drive, there is quite a little residential development. It is bounded on the north by a five-acre parcel, which I think is held under trust patent by Mr. Lee Arenas, which is developed as a cottage court, trailer camp.

Q. (By Mr. Brett): Did you form an opinion as to the fair market value in fee today of the 40-acre parcel? [104] A. I have.

Q. And what is that value? A. \$50,000.

Q. How much an acre?

A. That is \$1,250 an acre.

Q. Will you describe that property?

A. That property is located one-quarter mile south of the state highway which runs from Palm Springs to Indio, and one-quarter mile west of the east line of the section, and the nearest privately-owned land.

There is at the present time no roadway other than perhaps a desert trail leading into it. It is sloping, typical brush-covered desert land, characteristic of the area. It has a gentle slope to the north.

It is located on the broad alluvial fin coming out of San Andreas Canyon, Palm Canyon, and Murray Canyon, the alluvial fin below those canyons.

It is one-quarter mile to the nearest improved streets and to the nearest utilities.

It is zoned under the existing zoning ordinance for guest ranch use which, I believe, is called Zone E-2.

(Testimony of Bernard G. Evans.)

The development in the area is—I would say the adjoining section on the east is 10 to 12 per cent built up. It is in the nature of a residential subdivision operating, on, in a way as a ranch. That is, it is called—oh, Smoke [105] Tree Ranch, a restricted residential subdivision.

The area on the north side of the state highway has some rather substantial improvements on it, the Biltmore Hotel, the Deep Well Guest Ranch, and quite a little residential development, including 72 houses which were built in Tahquitz River Estates about two and a half years ago, and Paul W. Trousdale of Los Angeles has a part of a development which he undertook at that time.

Q. These properties you describe, such as the Biltmore Hotel, they have frontage on the highway, don't they? A. Yes.

Q. The Deep Well Ranch has frontage on the highway? A. That is true.

Q. The Smoke Tree Ranch has frontage on the highway?

A. The Smoke Tree property has, yes.

Q. The property which is the 40-acres allotted to Eleuteria Brown Arenas has no frontage on the highway and no part of it is closer than about a quarter-mile to the highway, is that not correct?

A. That is correct.

Q. Were there any properties which you investigated which you deemed to be comparable to that property? [106]

A. The nearest comparable, I think, in recent

(Testimony of Bernard G. Evans.)

times, is the fairly recent sale of a 10-acre parcel on the northwest corner of Ramon Road and El Cielo Road.

Q. Is that the same 10 acres?

A. No. This is 10 acres Bob Hope bought last March. It is comparable in the sense it is typical desert land. It is about the same distance from the downtown area. It is east instead of south and, of course, it is smaller in size. It is 10 acres, whereas we are talking about 40 acres here.

Q. As I understand it, Mr. Evans, you investigated in reference to the price paid, the date of the sale, by inquiring of the broker who conducted the sale, is that right?

A. Yes. I found the sales were rather widely known, but I talked to the man who actually made the sale.

Q. But you yourself did not act as the broker?

A. No, I did not.

Q. You can, however, if cross-examined, inform the court and counsel who interrogate you, as to what you learned of the terms and the prices?

A. Yes.

Q. And you considered that information in arriving at your opinion as to the value?

A. Yes.

Q. And that is the most recent and most comparable transaction in the Palm Springs area, in your opinion? [107]

Mr. Preston: Objected to as already answered

(Testimony of Bernard G. Evans.)

and argumentative, cross-examining his own witness, and everything that is wrong.

The Court: He may answer. The objection is overruled.

The Witness: Yes. It is the only recent sale of acreage, that is, a piece of 10 acres or more, anywhere near this property.

Q. (By Mr. Brett): Now, Mr. Evans, assume that the interest of Eleuteria Brown Arenas in the 2-acre parcel, the 5-acre parcel, and the 40-acre parcel, described in the complaint in 6221-PH Civil, as represented by the trust patent in severalty conveyed to her, consists of the vested right to receive at a subsequent date which is not now known, providing that she does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered she has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative, and has the right to lease such property to a third party or parties, who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative; that [108] she is entitled to receive the income derived from such leases unless the Secretary of the

(Testimony of Bernard G. Evans.)

Interior of the United States shall determine in his discretion that such income shall be held in trust for her benefit by the Office of Indian Affairs; that the present trust period expires on May 9, 1952, but may be continued for periods not to exceed 25 years without her consent and at the sole discretion of the President of the United States; that during the last 30 years all trust patents in severalty have been extended for 25-year periods prior to their expiration by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of her death before she receives such patent in fee simple and free of restrictions, her rights will descend to her heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, she may dispose of the same by Will; that until she receives a patent in fee simple free of restrictions, she may not sell and may not encumber her interest under such trust patent to any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion would be the fair market value [109] of such interest in said 2-acre tract?

Mr. Preston: I wish to renew the previous objection, and to add that that question doesn't prop-

(Testimony of Bernard G. Evans.)

erly characterize the estate of the Indian in the allotment and, moreover, does not deal with the value of the use and occupation of the property and the improvement by the Indian herself.

The Court: I will make the same ruling I made as to the other questions. The court reserves the final ruling on it. You may answer.

The Witness: I think the two-acre parcel under those conditions would be worth 50 per cent of its fee value, or the sum of \$6,250.

Mr. Preston: Is that for all three of them?

Mr. Brett: No. That is the two acres.

Q. Now, what, in your opinion, would be the fair market value of such interest in the five-acre tract?

Mr. Preston: To which we make the same objection.

The Court: Same ruling.

The Witness: The sum of \$16,250, or 50 per cent of the value in fee.

Q. (By Mr. Brett): What, in your opinion, would be the fair market value of such interest in the 40-acre tract?

A. \$12,500, or 25 per cent of the fee.

Q. Now, Mr. Evans, it is correct, is it not, that the values which you have given today are different, as far [110] as the interest of the Indian, than the values which you gave in October, 1948?

A. They are.

Q. Will you explain to the court the reason for that difference?

(Testimony of Bernard G. Evans.)

A. I have approximately 20 per cent lower value on the acreage today than I had two years ago. I found that as a result of my investigation of market conditions, that is a prevalent condition throughout the Palm Springs area. That they have had two very poor years, years of depressed occupancy and depressed building activity, and complete absence of subdivision development, during the last two or three years.

With respect to the two-acre parcel, I don't consider it is worth any less. That is fundamentally developed in the same manner and yields much the same return to the owner.

I believe that the value of the trust patent is substantially greater in the instance of the first two properties than I stated in 1948. At that time I understood and was informed that these leases and permits were subject to 30-day cancellation clause. I now understand and believe they can be made for five years.

Q. That is since the trust patent has been issued?

A. That's right. Therefore, I think that the value of the trust patents on the two-acre parcel and the five-acre [111] parcel is substantially higher than the figure I stated two years ago.

As to the acreage, the 40 acres, I see no difference in it, because I can't in my own mind conceive of any use which could be made of that 40 acres with the present conditions imposed upon it. Its best usefulness is for subdivision, and it couldn't con-

(Testimony of Bernard G. Evans.)

ceivably be subdivided or developed under the trust patent.

Q. Now, Mr. Evans, at my request did you in your last examination of properties in and around Palm Springs examine and also photograph some of the properties which Mr. Beckley had referred to as those being considered by him?

A. Yes.

Q. I will show you Respondent's Exhibit O for identification and ask you if that is a photograph that you took? A. Yes.

Q. When did you take that?

A. I took that last week, on Monday or Tuesday.

Q. What property is that a photograph of?

A. That is a two-story hotel property, one- and two-story hotel, at the southeast corner of Indian Avenue and Ramon Road. I believe it is called the Miramonte Hotel.

Q. The Miramonte Hotel? [112] A. Yes.

Q. After you had inspected the property, did you form an opinion as to whether or not that property had any comparability to the two-acre parcel in Section 14? A. I did.

Q. And what is that opinion?

A. I don't think there is the remotest comparability between the two.

Q. What is your reason for that opinion?

A. Location. This is a location on a main highway, one of the main roads of Palm Springs, and the main east and west road. That is, Ramon Road

(Testimony of Bernard G. Evans.)

runs east some 10 or 12 miles to the intersection of the state highway at One Thousand Palms, I believe it is called, a paved road all the way. This is in a hotel zone. I can't see that it compares in any way with the two-acre parcel.

Mr. Brett: I will offer Exhibit O in evidence.

The Court: Admitted.

The Clerk: Respondent's Exhibit O in evidence.

(The photograph referred to was received in evidence and marked Respondent's Exhibit O.)

Q. (By Mr. Brett): I will next show you Exhibit P for identification and ask you if you took that photograph? A. Yes, I did.

Q. The same day? [113]

A. The same day.

Q. And what is that a photograph of?

A. That is a two-story hotel, the Voranda, I believe.

Q. That is V-o-r-a-n-d-a?

A. Yes. That is on the east side of Indian Avenue a few hundred feet south of Ramon Road.

Q. After examining that property, did you come to any conclusion and opinion as to whether it had any comparability? A. I did.

Q. To the two-acre parcel? A. I did.

Q. And what is that opinion?

A. In my opinion, it has no comparability at all for the same reasons that I have just stated as applicable to the Miramonte.

Mr. Brett: I offer Exhibit P in evidence.

(Testimony of Bernard G. Evans.)

The Court: Admitted.

The Clerk: Respondent's Exhibit P in evidence.

(The photograph referred to was received in evidence and marked Respondent's Exhibit P.)

Q. (By Mr. Brett): I will show you Respondent's Exhibit Q for identification. Is that a photograph that you took? A. Yes. [114]

Q. On the same day? A. Yes.

Q. Is the location of that property within the area shown on Respondent's Exhibit A?

A. Yes.

Q. Could you indicate its location upon that exhibit?

A. I will mark it with a red cross. I may be one block off. I mislaid my notes. It is on the corner of Calle Encilia and Ramon Road.

Q. That is one of these duplex properties?

A. That is a single private residence, that particular house, although duplexes are on the street just south of it.

Q. I will also show you Exhibit R for identification and ask you if that is the photograph taken the same day of some of the duplexes you referred to.

A. Yes. Those are on Calle Santa Rosa or the next street east. I am not certain as to which one of those it is. It is either the third or fourth street east of Indian Avenue running south from Ramon Road.

(Testimony of Bernard G. Evans.)

Q. Are those fair representations of the improvements which are on those various calles?

A. Yes. They are characteristic of the improvements in that tract.

Q. Which are illustrated on Respondent's Exhibit A [115] as Calle Ajo, and so forth?

A. Yes.

Q. And run south from Ramon Road in a north and south direction? A. Yes.

Mr. Brett: I will offer Respondent's Exhibits Q and R in evidence.

The Court: Admitted.

The Clerk: Respondent's Exhibits Q and R in evidence.

(The photographs referred to were received in evidence and marked Respondent's Exhibits Q and R.)

Q. (By Mr. Brett): You have stated you considered some property on Sunny Dunes Road. I will show you a photograph marked S for identification.

A. Yes, I took that picture. That is on Sunny Dunes Road showing some recently built houses along the south side at a point approximately 2,000 feet east of Palm Canyon Drive. I am very familiar with that tract, because I was one of the original appraisers of the property under the program by which it was improved.

Q. And this is a fair illustration of the type of development of that tract?

(Testimony of Bernard G. Evans.)

A. Yes. The development is better on the other streets. This is the lower class of buildings. These are about in the \$8,000 to \$12,000 price class. [116]

Mr. Brett: I will offer this in evidence.

The Court: Admitted.

The Clerk: Respondent's Exhibit S in evidence.

(The photograph referred to was received in evidence and marked Respondent's Exhibit S.)

Mr. Brett: You may take the witness.

Cross-Examination

By Mr. Preston:

Q. Mr. Evans, what is the highest use that you have assumed would be made of the two-acre tract in Section 14?

A. That is a very difficult question to answer. The highest use that I can conceive being made of that property, in order to produce an income so long as the greater part of the section remains in the condition it is, is very much the way it is improved today. That is to say, quite often, in my opinion, inferior improvements or slum improvements, will produce more revenue.

Q. You have assumed, have you not——

A. May I finish my answer?

Q. Yes.

A. They will produce more revenue than if they were cleaned off and new houses built on there.

(Testimony of Bernard G. Evans.)

Q. You have made a long talk, but you haven't answered my question. My question is, what is the highest use you assumed would be made within a reasonable time of this [117] two-acre tract of land?

A. I don't believe within the next five years they will be used for any purpose different than they are being used for now.

Q. Is the purpose for which it is used now the highest purpose you have considered in making up your mind?

Answer that yes or no.

A. No, I wouldn't say it was.

Q. What is the highest use you have considered?

A. The only higher use I have considered, Judge, is a use which would envision the re-development of the entire area.

Q. Have you considered what the re-development of the entire area would consist of?

A. It would consist of a great many things.

Q. What kind of property, business property or residential property?

A. No, I don't think so. I think it would be very largely residential.

Q. Have you assumed, then, that the area would never be utilized for building purposes? I am talking about Section 14 fronting on nearby Indian Avenue.

A. I thought you were talking about the two acres.

Q. I am talking about all that area there.

(Testimony of Bernard G. Evans.)

Mr. Brett: Just a minute. I will object to that as [118] not only an improper question, but incompetent and irrelevant. Here is a 640-acre piece of land, the exterior areas of which border, at least, along Indian Avenue and Ramon, business thoroughfares.

Mr. Preston: I will reframe the question.

The Court: All right, reframe the question.

Q. (By Mr. Preston): Assuming all of Section 14 that borders upon Indian Avenue and for the distance of, say, 1,056 feet east, what, in your opinion, will be the use of that property, highest use of that property or any part of it during the next five years?

Mr. Brett: Object to that, if the court please, on the same ground. I will stipulate the highest and best use of that part of it which fronts on Indian Avenue and which is zoned for business, would be business. If the question leaves out "or any part of it," you may have the witness to state his opinion as to what would be the use of that to her. I don't think I would have any objection.

Mr. Preston: No.

Mr. Brett: But when he says "any part of it," I submit both by reason of the zoning and by reason of the actual situation, the highest and best use of this area along the main thoroughfare would be for business.

Mr. Preston: I want to know from this witness what use he considers will be the highest use of this area. [119]

(Testimony of Bernard G. Evans.)

The Witness: Several uses. The area along Indian Avenue will be for business use, as it is today. There are several areas just off Indian Avenue that are used for trailer parking. I think they will be continued. I don't think there will be any new construction in the area except along the business area and in the perimeter of it.

Q. (By Mr. Preston): Do you think the zoning ordinance will remain permanent?

A. No. They always change.

Q. Did I understand you to say that under the zoning ordinance if a fire should occur, better improvements would be built?

A. I didn't say zoning. I said the building code.

Q. Well, is there any reason in your opinion why it wouldn't be proper to allow business to be established in all of the west half of Section 14?

Mr. Brett: Just a minute. If the court please, I object to that as irrelevant and incompetent. The basis of the incompetency is this: These questions are predicated, not on the value as the situation exists, but as it might later exist, and that is not a proper question.

The Court: I agree with you on that.

Mr. Preston: What is the ruling?

The Court: I sustain the objection.

Mr. Preston: Upon what theory? [120]

The Court: It is the present value.

Mr. Preston: I know it is the present value.

Q. But in estimating the present value, haven't you considered that the zoning ordinance might be amended?

A. Oh, yes.

(Testimony of Bernard G. Evans.)

Q. Have you considered that the restrictions might be? A. What restrictions?

Q. The government restrictions, we will call them. A. On the trust patent?

Q. Yes, the trust patent.

A. I have put two values on it. I put one on the fee value and one on the trust patent.

Q. Have you considered the fact that the government, as trustee, might consent to the issuance of a fee patent? A. Oh, yes.

Q. You have considered that, have you?

A. Yes.

Q. Have you considered that the government might consent to a sale of the property and restrict the proceeds?

A. I considered that is a possibility.

Q. Have you considered the fact that the Indian might improve his own property? A. Yes.

Q. And erect business houses on it, if need be?

Mr. Brett: On which property? [121]

Mr. Preston: On any of it.

The Witness: I can't conceive of any business houses on any of the property in question.

Q. (By Mr. Preston): How is that?

A. I can't conceive of any business houses on any of the property. I can't conceive of the erection of any business building on any of the property under discussion.

Q. Is there any difference in your opinion between the value of the property to the Indian and

(Testimony of Bernard G. Evans.)

the market value of the property under these trust patents?

A. That is a legal question I wouldn't be prepared to answer.

Q. You couldn't answer that?

A. My opinion is the market value.

Q. You have not, have you, expressed an opinion here intentionally, at least, as to what the value to the Indian is of his allotment, have you?

A. No. The value to an individual is governed by so many, many things. It might be worth more to one Indian than to another. I wouldn't attempt to put a value on it to the individual.

Q. Then you wouldn't say what you have said about market value had any bearing upon the value of the property to the Indian allottee?

A. To the individual Indian? [122]

Q. Yes.

A. I couldn't look in his mind, Judge.

Q. You have assumed, have you, that some third person, the purchaser, would take this land from an allottee, but the government would still be the trustee of the land?

A. As to the value of the trust patent, yes.

Q. The government would still be the trustee and still regulate the use of the land in the hands of the purchaser, is that it?

A. Yes. I think that was the question that was put to me.

Q. And that is the question you have answered, isn't it?

(Testimony of Bernard G. Evans.)

A. As to the value of the trust patent.

Q. As to the value of the trust patent on the market. That is what you mean?

A. Under the theoretical market.

Q. Under the theoretical market, but it is the market value in your opinion, isn't it?

A. Yes.

Q. And it has nothing to do with what the Indian could do with his own property?

A. I have to say, Judge, again I can't tell you what any individual Indian thinks his property is worth. That is in his mind. [123]

Q. You haven't really considered what the Indian's own capabilities are with reference to his allotment, have you?

A. I consider what he can do with the property, but not what he thinks it is worth.

Q. How is that?

A. I have considered what the individual Indian could do with the uses he could make of his property, but I could not tell you what the individual Indian thinks it is worth to them.

Q. But when you put figures on this property, you put figures on a theoretical purchaser who would be tied down by all the restrictions in this question, is that it?

A. As to the trust patent, yes.

Q. As to the trust patent.

A. I consider he would have all the rights in the property that the Indian has now.

(Testimony of Bernard G. Evans.)

Q. But you don't know what the Indian's rights are now, do you? You are just taking what is in this question as true.

A. I know from my own knowledge and observation.

Q. What is your opinion about the nature of his title? A. His title now?

Q. The Indian allottee's, necessarily, what you know [124] about it.

A. He has a patent held in trust by the United States government.

Q. What is the difference between that and a trusteeship?

A. It is a trusteeship, except it has restrictions on it that he can't encumber it or dispose of it or hypothecate it, except subject to certain provisions.

Q. Have you assumed that the government, as trustee, would do its duty? A. Yes.

Q. Have you assumed that if it was to the best interests of the Indian to sell his land, that the government should consent to it? A. Yes.

Q. And would consent to it? A. Yes.

Q. Have you assumed that there is water on this land? A. Oh, yes. Domestic water?

Q. Yes, or irrigation water, if necessary.

A. Are we still speaking about the two acres?

Q. I mean all of it now.

A. There is no water on the 40 acres.

Q. There is water on what part of it? [125]

A. None.

(Testimony of Bernard G. Evans.)

Q. On the 5 acres? A. Yes.

Q. And accessibility to water on the 2 acres?

A. There is water on the 2 acres, city water.

Q. Have you assumed there would be ingress and egress from all these properties?

A. Yes.

Q. You have assumed all that and still you can't see any greater value when you come to put it on the market, is that it?

A. That is correct.

Mr. Brett: Greater than that.

Q. (By Mr. Preston): Greater than what you have given if it goes on the market encumbered in the way you have considered here in this question?

A. That is correct. I repeat again that was 50 per cent on the smaller parcel, 25 per cent on the larger parcel.

Q. You have changed your figures since the last testimony you gave?

A. Because of the change in the leases, yes.

Q. That is because of the change in the leasing restriction? A. Yes. [126]

Q. And that shows you are valuing this property as though the restrictions were permanent, are you not?

A. I am valuing it as they exist today, Judge.

Q. That is what I say, as though those restrictions would remain, so far as you know, indefinitely?

A. No. I don't know how long they will remain.

Q. And suppose the restrictions were lifted and

(Testimony of Bernard G. Evans.)

there weren't any restrictions at all about buildings or about the use of this property by the city of Palm Springs, would your opinion be the same as to value?

Mr. Brett: Just a moment. Object to that on the ground it is not proper cross-examination and it is incompetent and irrelevant. That again is assuming a condition which does not exist and, therefore, is not a basis of value. You can't value property on the theory if it is changed, it will have a certain value. That is the same ruling your Honor made, but if you want authority, I will give it to you.

The Court: Objection sustained.

Q. (By Mr. Preston): Suppose that a piece of property was in the hands of a competent trustee, or the legal title was in the hands of a competent trustee, honest trustee, and the equitable estate was in an individual, would you put a different value upon that estate than one in which there was no trustee? [127]

A. That would depend on the terms of the trust, Judge.

Q. The terms of the trust. What are the terms of the trust in this case where the government is the trustee that are so onerous as to depreciate the value?

A. The principal thing which depreciates the value here, in my opinion, is the fact that it becomes a frozen investment.

Q. A frozen what?

A. A frozen investment. It cannot be hypothe-

(Testimony of Bernard G. Evans.)

ated, cannot be sold, you cannot borrow any money on it, and you couldn't make a loan on it to improve the property. It is frozen.

Q. You mean without the consent of the trustee?

A. That's right, yes.

Q. Wouldn't that be true of any kind of property that was held in trust?

A. It would depend on the terms of the trust. Let me explain it this way. If I have a piece of property I am beneficiary of, and it is held by a trustee, and it provides—for instance, it is suitable for subdivision, and provides under no circumstances shall it be cut up or subdivided for the next 15 years, which the grantor might have had some reason to put in there, its market value is certainly adversely affected because of that prohibition in it. [128]

Q. Have you considered the question that it is the duty of the government to protect the Indian?

A. Oh, yes.

Q. And it has no other duty in connection with the allottee except to protect the Indian's interest in it?

A. I so understand that.

Q. If it was to the best interests of the allottee that a mortgage be made, for example, to build a house on the property, wouldn't you presume that the government would consent to it?

A. I don't think I have ever heard of anything like that, but I guess it could.

Q. But wouldn't you, in such event, presume that the government of the United States would

(Testimony of Bernard G. Evans.)

consent to anything that was to the advantage and best interests of the Indian?

A. Yes, except in some cases hypothecating it might prejudice the property to the point where he might lose it.

Q. But if arrangements were made that he would not lose it, would it be all right?

A. That is looking pretty far to the future.

Q. Isn't this reservation in a very unique location? A. Yes, it is.

Q. It is adjacent to the business district of Palm Springs, is it not?

A. Yes, the west side. [129]

Q. Do you agree it would be feasible for Palm Springs to expand over part, at least, of this Section 14? A. Would it be feasible?

Q. Yes.

A. It would be under the orderly plan of development. Otherwise, it wouldn't be.

Q. Have you considered the orderly plan of development for that area?

A. I have considered it, but I find myself running up against peculiarities.

Q. The sum and substance of this whole matter is that you have assumed this area surrounding this two-acre tract will remain as a shack area indefinitely, have you not?

A. I won't say that. I am very much afraid it will. In my opinion, it will, unless by some means it can be brought in under a re-development plan, an urban re-development plan, and completely

(Testimony of Bernard G. Evans.)

obliterated and started all over again. Otherwise, I think it is doomed to a very unhappy future.

Q. Have to rub it out and start all over again, you think?

A. For any decent development, Judge, I am afraid so.

Q. Therefore, you haven't considered that element as [130] a part of any value in your appraisal, have you?

A. I have actually given this figure a much higher value than I would as a part of a re-developed area.

Mr. Preston: Will you read that answer, please?

(Answer read by reporter.)

Q. You have given it a higher value, you say, than you would if it was a re-developed area?

A. Oh, yes. Let me put it this way, Mr. Preston. Let's keep the Indian Avenue frontage out of it. If we were to take the westerly 300 acres of Section 14 and put it all in one pot and sell it to Palm Springs interests to re-develop the entire area——

Q. It wouldn't bring as much as you have given?

A. Absolutely not. It wouldn't bring more than \$3,500 or \$4,000 an acre.

Q. Your conclusion is that the property is covered with shacks and it is more valuable that way than if it was re-developed?

A. With this property, that is undoubtedly true.

Q. It is undoubtedly true with this property?

(Testimony of Bernard G. Evans.)

A. As far as monetary value goes, Judge, I have to say it is true.

Q. Even with business?

A. I don't think there is a chance of business there in the next 100 years. [131]

Q. Suppose there was a trailer court.

A. There is 600 acres in that section. I can't presume it is going to light on that patch.

Q. You are committed to the thought that that area is about as productive as to income now as it will ever be?

A. As to this parcel right there, yes. If it were on the main east and west street, I think it is conceivable an eventual re-development of the section may extend the east and west street through the section, but I repeat the market value of the westerly acres in that section would not, in my opinion, as a result of all my investigation, be more. I think \$3,500 or \$4,000 an acre would be a big figure.

Q. Let's come down to the five-acre tract. You agree west of that area is very highly developed, don't you?

A. Highly developed in the sense it has a high type of residences. It is not highly developed from the——

Q. What do you consider the highest use of that five acres?

A. Residential on the Palm Canyon Drive frontage, and cottage courts or trailer courts or rental units as to the balance.

Q. How much of each?

(Testimony of Bernard G. Evans.)

A. Well, I think the zoning is 150 feet deep, and you would be prohibited from using that 150 feet for anything but residential use. [132]

Q. The 40 acres, what is that zoned for?

A. For residential or so-called guest ranch.

Q. What have you assumed would be its highest use?

A. Potential subdivision, not ripe at the present time.

Q. Not at the present time? A. Yes.

Q. For residences only?

A. For residential and small desert guest ranch type.

Q. Has your opinion changed about the value of that 40 acres?

A. It is worth less than it was two years ago.

Q. And the same is true of the five acres?

A. Yes.

Q. Your other figures were how much at the last trial for the fee title?

A. 36,500 on the five acres and 60,000 on the total.

Q. Your total figure for the three lots before was how much?

A. I believe it was 104, Judge. You mean two years ago?

Q. Well, if you don't have it before you, we can get it. A. \$104,000. [133]

Q. What are your figures this time?

A. \$95,000. It was 109. I take it back.

Q. 109, and now you are down to 95, is that it?

(Testimony of Bernard G. Evans.)

A. That is correct.

Q. Mr. Evans, are you employed regularly by the government?

A. No. Extremely irregularly. I think I have been employed once by the government since I came out of the Marine Corps five years ago.

Q. How many times have you testified for the government in the last two years, say?

A. For the federal government?

Q. Yes.

A. You were here. That is the last time.

Q. The last time was in the Lee Arenas case?

A. Yes.

Q. You are not a regular employee of the government? A. That was the last time.

Q. You work on a per diem? A. Yes.

Q. Have you worked in this case on a per diem?

A. Yes.

Q. You are not employed now by the government in any other case?

A. No. Oh, the Lee Arenas case. [134]

Q. Just the Arenas cases?

A. That is correct.

Mr. Preston: That's all.

Mr. Brett: That's all.

(Witness excused.)

Mr. Brett: I will call Mr. Donald C. Jones.

DONALD C. JONES

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Donald C. Jones.

Mr. Brett: Your Honor, before I proceed with this examination, the thought has occurred to me, and I would like to ask information of the court on it. As you are aware, I am putting my evidence on out of order, but may I have this right? If the witness which Judge Preston anticipates putting on should develop some evidence which I would desire to rebut, may I have the right to do so by witnesses, as well as by cross-examination?

The Court: Certainly. You are accommodating him.

Direct Examination

By Mr. Brett:

Q. Mr. Jones, you, too, testified in this same proceeding [135] in 1948? A. I did.

Q. And your testimony is set forth in the printed transcript of the record on appeal, which has been received in evidence as Exhibit 8? A. It is.

Mr. Brett: As I understand, Judge Preston, to save time, you will stipulate to his general qualifications?

Mr. Preston: Yes, sir, and I will stipulate the questions and answers propounded to him were correct before. I have no objection to his qualifications.

(Testimony of Donald C. Jones.)

Q. (By Mr. Brett): Mr. Jones, upon the request of the government, have you reviewed this property and re-examined it for the purpose of arriving at an opinion as to the value today?

A. Yes, I have.

Q. Without repeating the description of the property, you were present in court when Mr. Evans described the property? A. Yes.

Q. Do you adopt those descriptions as your own?

A. Yes. His descriptions of the property were quite accurate, I believe.

Q. Mr. Jones, in connection with your further examination, and also the previous investigation, did you consider [136] any transactions which you deemed to be comparable?

A. Yes. I attempted to learn the facts regarding every transaction of acreage property which has occurred in the Palm Springs district. During the course of my many appraisal experiences down there, I have accumulated a large quantity of information regarding these properties, many of which have resold since the time of my original investigation.

I have information on about 20 properties which are in some respects quite comparable, and in other respects not so comparable, to the acreage involved in this transaction.

Q. In obtaining the information, what means did you use?

A. I used the public records of Riverside County, showing the deeds of record. I used the

(Testimony of Donald C. Jones.)

interviews with the actual buyers and sellers in some instances, and conversations with the brokers who handled the transactions.

Q. Do you have before you the Respondent's Exhibit D, a map? A. Yes, sir.

Q. Would you briefly relate to the court these various transactions that you considered, limiting yourself to this: Show them by Nos. 1 to whatever numbers you use on the map, relating their location and locating them on the map, and stating the character of the property as to its description and size. [137]

A. Do you wish them in any particular order, or the order in which I have them here?

Q. Just use your own order.

A. There are some sales of residential lots on Palm Canyon Drive directly across Palm Canyon Drive from the five-acre parcel involved in this transaction.

Mr. Preston: From which property, Mr. Jones?

The Witness: The five-acre tract. Directly across the street, in the residential area fronting on Palm Canyon, in the past three years there have been about four lots transferred there by purchase for residential development, vacant lots. I have the names of the buyers and sellers, and the amount of the transactions on the lots.

Q. (By Mr. Brett): Will you indicate them, not the names or the prices, because the court has ruled that is not proper examination, but will you

(Testimony of Donald C. Jones.)

indicate the names and the numbers, so they can be referred to on the map, which is Exhibit D?

A. I am indicating on Exhibit D the sale of lots on Palm Canyon Drive opposite or directly west of the five-acre tract. I am indicating them by the numbers 1 and 2.

Q. Now, were those transactions that you considered in relation to the value which you fixed as the fee value of the five-acre tract?

A. Yes. I considered that these sales on the open [138] market of residence lots on Palm Canyon Drive were an indication of the fair market value of the property immediately across the street, were it so developed.

Q. Will you please indicate other property you considered?

A. There is a property comprising approximately 60 acres, located on the east side of Palm Canyon Drive, which extends just off of this map, and the ownership is a man named Rauber, which has been offered on the market for the past three years. It has a large sign on the property, "For Sale." I considered the offered price on that property and I considered the price Mr. Rauber paid for its acquisition in 1946.

Q. As to that, whom did you interview to get the details of the sale and the price paid at the time Mr. Rauber bought it?

A. I interviewed the broker, who handled the transaction.

Q. What was his name?

A. Mr. Cree.

(Testimony of Donald C. Jones.)

Q. You have got the name of the seller and the buyer and the price paid, have you?

A. Yes, sir. I indicate that on the exhibit as item No. 3.

Q. That name is spelled R-a-u-b-e-r? [139]]

A. I might check that, Mr. Brett. R-a-u-b-e-r, yes, sir, that is right.

Q. Did you consider that that property had some comparability?

A. I misspoke as to the agent that handled the transaction. It was Willard Gieb. I interviewed some 15 brokers in Palm Springs in regard to this general investigation. Willard Gieb was the agent.

Q. Did you consider that that property had some comparability to one of the parcels here?

A. It is somewhat superior in that it is upland property and has a commanding view of the Palm Canyon area, but it is similarly zoned for residential development at the present time, and is being developed by a scenic driveway road through it by the present owner.

Q. What property did you consider it had comparability to?

A. It had comparability to the five-acre tract for residential development.

Q. What other transactions did you consider?

A. The purchase by Paul Trousdale and Associates of a tract of land which had been developed as the Tahquitz River estate tract.

Q. Will you spell Mr. Trousdale's name and spell Tahquitz? [140]

(Testimony of Donald C. Jones.)

A. T-r-o-u-s-d-a-l-e, Paul W. Trousdale and Associates. They are the purchasers of the property. However, the title is taken in the name of the Palm Springs Tahquitz Company. That is T-a-h-q-u-i-t-z. That is the name of an Indian creek which traverses the property.

Q. Where was that property located?

A. That property is located approximately one-half mile northerly of the five-acre tract, maybe three-quarters mile northerly. It has frontage on Palm Canyon Drive, and extends from Sunny Dunes Road on the north to Mesquite Avenue on the south. The property has 136 acres of useable land. The Tahquitz Creek channel traverses the center of the property.

The property was purchased in November, 1947, from Pearl McManus. I have the purchase price and I have interviewed Mrs. McManus regarding the sale and confirmed the selling price.

Q. That was purchased as vacant land?

A. That was purchased as raw, undeveloped desert land in November, 1947. Since that time, it has been developed, partially developed. About 40 acres of the 136 acres have been developed as a residential tract with 72 homes built upon it.

Q. Will you mark that or indicate that on Respondent's Exhibit D as to its location? [141]

A. I indicate that on Exhibit D as item No. 4.

Q. Which of the parcels did you consider that that had some comparability to?

A. That property in my opinion is superior to

(Testimony of Donald C. Jones.)

the 40-acre tract here involved in the matter of its location and its zoning. In other respects, it is quite comparable.

Its topography is similar and its general uses might be considered to be similar in that the 40-acre tract is likewise possible of development for residential subdivision use.

Q. The 40 acres, however, has no frontage?

A. The 40 acres has no frontage, and access roads would have to be built to it, as well as utilities brought to it. The property purchased by Trousdale and Associates had available to it the utilities of water, gas, and electricity, immediately available.

Q. Were there any other properties that you considered?

A. Yes, quite a number. I considered the purchase by Bob Hope of a 10-acre tract on Ramon Road approximately—well, it is over a mile northerly of the 40-acre tract, but it is within a little over a half mile from the two-acre tract involved in this action.

Q. How many acres was there?

A. Ten acres were purchased by Bob Hope in this transaction. [142]

Q. Did you obtain the information as to the purchase price?

A. Yes, I did.

Q. From whom?

A. I obtained that information from Mr. Wright, the Palm Springs broker that handled the sale.

(Testimony of Donald C. Jones.)

Q. Do you have Mr. Wright's full name?

A. Billy Wright. William Wright is his full name, but he advertises himself as Billy Wright.

Q. Will you describe that property?

A. The property is just east of the Catholic school and is located on the Ramon Road frontage. It is 660 feet in dimension, 660 feet each way, a square, rectangular parcel of level land. It has frontage on Ramon Road, and also El Cielo Road.

Q. To what properties did you consider it was somewhat comparable?

A. It is comparable to the possible ultimate development of the two-acre tract, in my judgment, for residential use, and it was also comparable to the five-acre tract on south Palm Springs Canyon Drive.

Q. Will you indicate that on Respondent's Exhibit D?

A. I am indicating that transaction, the location, by the No. 19, which is the reference number I have used in [143] my sales information.

Q. Approximately how many other transactions, Mr. Jones, do you have that you deemed directly comparable?

A. Well, I have 20 transactions here involving acreage. Some of them are more removed. There is another transaction I think is an indication of the value of the 40-acre tract on Ramon Road, somewhat westerly of the piece purchased by Bob Hope. It was originally acquired by the government as an expansion of the airport, and then declared sur-

(Testimony of Donald C. Jones.)

plus property, the original owners recovering title, and they have resold the property in three transactions. There are 40 acres in the property.

Q. In what size transaction have they been sold?

A. They have sold it off in three parcels. 20 acres was purchased by a local syndicate. 10 acres was purchased by the Catholic Church of Palm Springs, and 10 acres was purchased by Leo Files.

Q. Did you obtain the information as to the price which was paid in each of those transactions?

A. Yes. I had made an appraisal of the property in 1943. I discussed the resale of the property by the owners, Ethel A. Walker and E. T. McFadden of Santa Ana.

Q. Will you locate those three properties as a unit, since they are adjoining, by some designation on Respondent's Exhibit D? [144]

A. I am indicating the 40 acres sold by McFadden and Walker by the No. 6 on this Exhibit D.

Q. I don't want to take more time in those matters, but should counsel desire to question you as to the others, you have the information and could also indicate their location by describing and by placing them on this or any map of similar character?

A. I could.

Q. And in what respects you consider them comparable?

A. Yes, sir, I could.

Q. Now, Mr. Jones, have you formed an opinion as to the present-day value, that is, the today's value in fee, that is the market value in fee of this two-acre parcel?

A. I have.

(Testimony of Donald C. Jones.)

Q. And what is that opinion?

A. In my opinion, the two-acre parcel for fee simple title thereto at the present time has a value of \$12,800.

Q. That would be \$6,400 per acre?

A. Yes, sir.

The Court: 12 thousand what?

The Witness: \$12,800, or at the rate of \$6,400 per acre.

Q. (By Mr. Brett): Could you briefly state the reasons for that opinion? [145]

A. That opinion is based upon a consideration of the development of the property surrounding it, the development on the subject property, its present uses, its present income possibilities, and the sales of properties in the perimeter lands southerly of Section 14, which I have already mentioned.

Q. Mr. Jones, I don't want you to go into any considerable detail, because of time, but, briefly, will you indicate what those first two or three points are, which you refer to when you say the surrounding area and what you refer to when you say the development in the area?

A. The property is located in the approximate center of a helter-skelter development of shacks and low-grade cottages, which has sprung up without regard to regulation of any kind.

I think that any development of the property necessitates the eradication of that helter-skelter, unregulated present condition. However, the in-

(Testimony of Donald C. Jones.)

come from this property under present conditions is such that I consider the value of the property greater than it would be developed as a residential tract.

I don't know whether I am permitted to say what the income stream is, but I know what the income stream is from these shacks on there, and it is greater than could be anticipated from any other development of the property, in my judgment. [146]

Q. Do you have an opinion as to the fair market value today of the fee simple of the five-acre parcel?

A. Yes, I have.

Q. What is that opinion?

A. In my opinion, the five-acre tract has a present market value for fee simple title of \$35,000, or at the rate of \$7,000 per acre.

Q. Will you state your reasons for that opinion?

A. I base that opinion upon the adaptability of the property for residential development of the 150-foot depth fronting on Palm Canyon Drive, and the prices now being paid for residential property fronting on Palm Canyon Drive in the immediate vicinity, and for the possible use of the remaining land for trailer court development, for which it is presently zoned, or for further residential development of the property.

Q. Do you have an opinion as to the fair market value of the fee simple title to the 40-acre parcel as of today?

A. I do.

Q. And what is that opinion?

A. In my opinion, the fee value of the 40-acre

(Testimony of Donald C. Jones.)

tract as of today is \$54,000 or at the rate of \$1,350 per acre.

Q. Will you give your reasons for that opinion aside from those already given? [147]

A. That property has no present water supply. By that I mean there is no water piped to the property. There are no streets to the property. It is zoned for guest ranch development, that is, large tracts of desert land upon which a man builds his home for a gentleman's estate, you might call it.

The property would require expensive development to command a market today. It lies isolated from any other developed area.

By comparison of the sales of other acreage tracts, in my opinion the highest price this property could command today is \$1,350 an acre.

Q. Now, Mr. Jones, assume that the interest of Eleuteria Brown Arenas in the 2-acre parcel, the 5-acre parcel, and the 40-acre parcel, described in the complaint in 6221-PH Civil, as represented by the trust patent in severalty conveyed to her, consists of the vested right to receive at a subsequent date which is not now known, providing that she does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered she has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the [148]

(Testimony of Donald C. Jones.)

Interior of the United States or his authorized representative, and has the right to lease such property to a third party or parties, who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative; that she is entitled to receive the income derived from such leases unless the Secretary of the Interior of the United States shall determine in his discretion that such income shall be held in trust for her benefit by the Office of Indian Affairs; that the present trust period expires on May 9, 1952, but may be continued for periods not to exceed 25 years without her consent and at the sole discretion of the President of the United States; that during the last 30 years all trust patents in severalty have been extended for 25-year periods prior to their expiration by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of her death before she receives such patent in fee simple and free of restrictions, her rights will descend to her heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, she may dispose of the same by Will; that until she receives a patent in fee simple free of restrictions, she may not sell [149] and may not encumber her interest under such trust patent to

(Testimony of Donald C. Jones.)

any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion would be the fair market value of such interest in said 2-acre tract?

A. Yes, I have an opinion of the trust patent rights in the two-acre tract, assuming that can be sold.

Mr. Preston: Will you read that answer, please?

(Answer read by reporter.)

Q. (By Mr. Brett): What is that opinion?

A. In my opinion, that value is \$6,400 or 50 per cent of the fee value.

Q. Do you have an opinion of the fair market value of such interest in the five-acre tract as of today? A. Yes, sir, I have.

Q. What is that opinion?

A. In my opinion, that is likewise 50 per cent of the fee value, or \$17,500.

Q. And do you have an opinion as to the fair market value of such interest in the 40-acre tract as of today? A. Yes, I have.

Q. What is that opinion?

A. \$13,500 or 25 per cent of the fee value.

Q. Will you give your reasons for those [150] opinions, Mr. Jones?

A. In my opinion, the limitations upon the use of the property—by that I mean the inability of the owner of this property to hypothecate it in

(Testimony of Donald C. Jones.)

any way for its future development, he can't borrow money on it, he can't sell it, I think that would bring a sales resistance to this property equal to at least 50 per cent of its fee value.

In the case of the 40-acre tract, which is undeveloped and has no income possibility, I think it will amount to 75 per cent of the fee value, or leaving only 25 per cent of the value for this trust patent right, because of the restrictions making it impossible to hypothecate the property in any way.

Q. Now, Mr. Jones, your opinion as to the trust patent value as expressed on the basis of today's value is greater than the opinion you expressed in October, 1948, is it not? A. Yes, it is.

Q. Will you explain the reason for the difference?

A. The reason is that in 1948, these properties could be leased for five years, but the leases all contained a cancellation clause, 30-day cancellation clause, which was tantamount to only a 30-day lease. Now the properties can be leased for five years, but that restriction has been removed. Consequently, a man can expect to enjoy the income from the [151] property for five years, as against a 30-day period.

Q. Is there a difference in your opinion of the fee title value expressed as of today, as compared to 1948?

A. Yes. I have reduced the value of the fee title 10 per cent from what they were in 1948, which I base upon my investigation of the general

(Testimony of Donald C. Jones.)

economic conditions in Palm Springs affecting real estate, the general lack in volume of sales, the selling of property at discounted prices from what they were held at in 1948.

Mr. Brett: You may take the witness on cross-examination.

Cross-Examination

By Mr. Preston:

Q. Mr. Jones, the theoretical purchaser of this restricted area comprised of these three parcels would be a person to whom the trustee or the government would owe no duty whatsoever, would he? Or would he be a purchaser to whom the government would have to act in his best interests?

A. I am assuming that the purchaser would acquire the same rights as the Indian now has, and I am assuming that the government is acting as trustee for the Indian in his best interest.

Q. You are assuming that the government would be the trustee for the purchaser?

A. That is the assumption I am making, Judge, yes, [152] sir.

Q. You would assume that the government was the trustee of the purchaser, would you?

A. I would have to so assume, yes, sir.

Q. And that the government had consented to the sale or not consented to the sale?

A. I am assuming that the government would consent to the sale. Otherwise, there would be no sale.

(Testimony of Donald C. Jones.)

Q. What would the purchaser not get in the way of title under your assumption?

A. The purchaser would acquire the rights, the trust patent rights now held by the Indian.

Q. If the government consented to the transfer by the Indian of all his rights to this purchaser, why isn't that a full fee conveyance?

Mr. Brett: Object to that, if the court please, as calling for a conclusion of the witness and a question of law.

The Court: It is a question of law. Sustained. The court has got to do something about that.

Mr. Preston: I saw your Honor take an interest in it. I thought you might like to have it answered.

The Witness: I have a legal——

The Court: Never mind, now.

Q. (By Mr. Preston): We have a case here now where [153] the government has consented to the sale of the Indian's rights and yet retained, according to your view, the right to supervise it afterwards, is that right?

A. I answered the hypothetical question which was propounded to me, Judge Preston, in which I assumed all the things were true.

Q. You are not retracting the statement, are you, that you have assumed that the government would consent to the sale?

Mr. Brett: Of that particular interest, as so restricted, yes.

(Testimony of Donald C. Jones.)

Mr. Preston: Just a minute. Let the witness answer. You are not on the stand.

The Court: You are still arguing a legal question.

Mr. Brett: I will then object to it on the ground it is a legal question.

The Court: I have sustained the objection as a legal question.

Mr. Preston: I am asking what he assumed, not what the facts are.

Q. Now, Mr. Jones, here is Indian A with a good allotment, two acres we will say, in Section 14. Have you considered in making up your mind what the value of that property would be to him to keep?

A. I haven't made any assumptions as to what the [154] individual Indian might expect to get from it if he kept it, no. I have assumed what I think is the fair market value of it on the open market to any buyer, not to the individual Indian.

Q. You have given your opinion based upon these restrictions, which you consider burdensome, on the title of the property?

A. I have as to the trust patent, but not as to fee title.

Q. You would be surprised if you found anybody that would pay anything for it, would you not?

A. No, I wouldn't say that is true. As to the two-acre parcel, it has a very substantial income stream, which I am familiar with. I think the

(Testimony of Donald C. Jones.)

purchaser of the trust patent would enjoy that, and it would be an investment that would merit considerable thought.

Q. He couldn't sell it?

A. No. That would be a considerable handicap, and I have discounted it 50 per cent.

Q. Let's take the two-acre parcel. You have considered it is in helter-skelter development.

A. Yes, sir.

Q. And to be any good, you would have to have that eradicated?

A. No, sir. To be any good from a monetary standpoint—— [155]

Q. Better kept it the way it is?

A. I think it would be all right from a revenue-producing standpoint.

The Court: It is now time to adjourn. This may last some time. We will recess now until 10:00 o'clock tomorrow morning.

(Whereupon, a recess was taken until the following day, Wednesday, November 29, 1950, at 10:00 o'clock, a.m.) [156]

Wednesday, November 29, 1950. 10:00 A.M.

The Clerk: Eleuteria Brown Arenas v. U. S. A., No. 6221-PH Civil, further hearing.

The Court: You may proceed.

Mr. Brett: We were directed by Judge Mathes to inform you that the companion case, the Lee Arenas case, which also involves attorney's fees, was set over to February 6th.

(Testimony of Donald C. Jones.)

The Court: Then he wants us to go right along.

Mr. Brett: We understand that, but I am merely reporting to you what he told us.

Mr. Preston: There is no suggestion this case will hang on until February 6th?

Mr. Brett: No. There was no purpose or intent, except to report.

The Court: I understand.

Mr. Brett: This is to be continued cross-examination of my witness, your Honor.

DONALD C. JONES

called as a witness by and on behalf of the respondents, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Preston:

Q. Mr. Jones, your figures, when you testified at the [158] previous hearing, were \$12,800.00 on the two-acre tract, \$40,000.00 on the five acre tract, \$60,000.00 on the 40-acre tract. Is that correct?

A. That was my opinion of the fee value as of 1948.

Q. Just answer the question and we will get along all right.

A. Yes, sir, it was the value of 1948.

Mr. Brett: If the Court please, the witness at that time, as well as yesterday, gave two different valuations. He gave a valuation of the fee and a

(Testimony of Donald C. Jones.)

valuation of the trust patent, and I think he is entitled in his answer to state that the figures the Judge asked were his figures of the fee valuation.

Mr. Preston: I want him to just answer my question.

The Court: Yes, and then you can question him.

Mr. Preston: I want him to answer my question and then he can say he has amended his figures so that the total now, instead of \$112,800.00, is \$100,800.00.

The Witness: That is my opinion of the value in 1950.

Q. (By Mr. Preston): What is that?

A. That is my opinion of the fee value of the property in 1950.

Q. 1950?

A. As of now. That was the question propounded to me.

Q. I understand that. I wanted to review it and see if I understood you. Now, Mr. Jones, you know what market [159] is in the contemplation of law?

A. Yes, I do.

Q. You can recite the definition, can you not?

A. I can recite several. I can recite the one handed down by the Supreme Court of the State of California.

Q. Give us your definition of it, Mr. Jones.

A. Market value, fair market value, is that price which a willing purchaser will pay for a property when it is exposed for sale on the open market,

(Testimony of Donald C. Jones.)

knowing all the uses and adaptabilities of the property in question, and a willing seller will accept for that property, he also knowing all the uses and adaptabilities of that property, with a reasonable time allowed in which to consummate the transaction.

Q. Have you considered all the uses and adaptabilities of the two-acre tract?

A. I believe I have. I have attempted to.

Q. And the five-acre tract?

A. I believe so, sir.

Q. And the 40-acre tract?

A. I have attempted to, yes, sir.

Q. Have you considered that the two-acre tract might be rezoned for business purposes?

A. It could presumably be rezoned for such use. In my opinion——

Q. What? [160]

A. In my opinion, it would be some time before the property can have any adaptability for such use.

Q. I am not asking you that at all. I am asking you whether you had considered whether or not it could be properly rezoned for business property. Answer that.

A. Not in the immediate future, in my opinion, would it be properly rezoned for business.

Q. I am not asking you that. Did you consider that it was adapted for rezoning for business property?

(Testimony of Donald C. Jones.)

A. No, I wouldn't consider it was adapted for business property.

Q. You wouldn't consider it was adapted for business property, and you haven't considered that element in making up your value figures?

A. My value of the two-acres——

Q. Just answer that question.

Mr. Brett: What is the element?

Mr. Preston: Adaptability for business purposes.

The Witness: The property at present is being used for income business purposes.

Q. (By Mr. Preston): Will you please answer my question? Have you considered that this property, these two acres, are adaptable in your opinion for business purposes? A. It is now so used.

Q. It is now so used? [161]

A. It is now used for rental income purposes, which is a business purpose.

Q. I am talking about general business purposes.

A. In my opinion, the property is not adapted to that use, Mr. Preston. It may be sometime in the future, but it is so far removed from the business district of Palm Springs that in my judgment that is far in the future.

Q. What are you talking about? The two-acre tract?

A. The two-acre tract on the dirt road.

Q. How far is it from Indian Avenue?

A. It is a little less than a quarter of a mile.

Q. From Indian Avenue?

(Testimony of Donald C. Jones.)

A. Yes, sir. The one side of it is less than that. One tier of lots between it and Indian Avenue, 580 feet.

Q. 528 feet from its southwest corner to Indian Avenue, isn't that true? A. That is true.

Q. And what is the length of the two-acre tract?

A. The length of it?

Q. Yes, east and west.

Mr. Brett: The width, that would be, wouldn't it? Oh, yes, the length.

The Witness: I have the exact dimensions of it. It is 528 feet in length.

Q. (By Mr. Preston): 528 feet in length, and that is the [162] distance from one of the main streets in the business area of Palm Springs, isn't it? A. Yes.

Q. The whole business area is in Section 15, is it not?

A. The business area is in Section 15, yes, sir.

Q. And Section 15 lies immediately west of Section 14, does it not? A. It does, yes, sir.

Q. And the Brown property is 528 feet from the west section line, is it not? A. That is true.

Q. And you consider that too remote to be of any prospective value?

A. It is, in the immediate foreseeable future, in my judgment, yes, sir.

Q. You priced the five-acre tract at a higher value per acre than the two-acre tract, didn't you?

A. No, sir. Quite the reverse.

Q. What is the difference?

(Testimony of Donald C. Jones.)

A. Oh, I beg your pardon. I was thinking of the 40 acres. Yes, sir, I did.

Q. That is how far from the business district of Palm Springs? A. About a mile.

Q. A mile and a quarter or a mile and three-quarters, [163] is it not?

A. Yes, about a mile and a half to a mile and three-quarters.

Q. A mile and a half to a mile and three-quarters, and you placed a figure on that property higher than you did on the two-acre property which lies 528 feet from the east boundary of Indian Avenue?

A. Yes, the per-acre value, I did, yes, sir.

Q. You did that, did you?

A. Yes, sir, I did.

Q. Why did you do that?

A. Because in my judgment, Judge Preston, the two-acre tract, although it is only 528 feet from the main street of Palm Springs, its highest value is represented by its present income stream.

Q. What I am trying to get at is, you have made your valuation upon its present situation, have you not? A. I have, yes, sir.

Q. You have considered, as I remember, three things. The development around the two acres, is that right? A. Yes, I have.

Q. The present use of the two acres?

A. Yes, sir.

Q. And the present income from the two acres?

A. I have, yes, sir. [164]

(Testimony of Donald C. Jones.)

Q. And your figures are based upon those assumptions, those facts?

A. Yes, sir. I am considering its present value.

Q. And that is solely the basis of your opinion, is it not?

A. No. I have considerable information regarding the plans of development of Section 14, which may or may not take place, and I am unable to predict the future value of that property.

Q. You haven't given it any weight, have you, in your opinion?

A. No. I have given no weight to the possibility of the development of a second Indian Avenue 500 feet east of the present one.

Q. Can't you answer my question directly? Have you given this element any consideration in the valuation you placed upon the two acres?

Mr. Brett: Just a minute. If the Court please, before the witness is required to answer that, I submit he should be allowed to finish his previous answer.

The Court: He can do so in this answer.

Mr. Preston: It is not responsive.

The Witness: I have not given any consideration to the development of a second Indian Avenue easterly of the present one, if that is the import of your question, sir. [165]

Q. (By Mr. Preston): The fact that Indian Avenue might be widened has not been considered by you?

(Testimony of Donald C. Jones.)

A. Yes, sir, I know that is possible.

Q. What?

A. I realize there are efforts being made to widen Indian Avenue.

Q. Did that enter into the valuation you placed on the two acres? A. No, sir.

Q. It did not? A. No, sir.

Q. You realize, do you not, since you testified before, allotment proceedings have been practically completed on a great portion of Section 14?

A. I understand so.

Q. That has not added to the value of it in any way, has it?

A. It was my information the only change in status of the trust patent rights is that they now may be leased for five years without cancellation clauses.

Q. I am asking you if that has made any difference in your figures?

Mr. Brett: As to which value, Judge?

Mr. Preston: As to either of the values.

The Witness: Yes. My opinion of the value of the trust [166] patent rights is considerably increased from what it was in 1948.

Q. (By Mr. Preston): We will separate it. Take the fee title to the two acres. Has the market value of that title, in your opinion, been changed any because of the completion, or practical completion, of these allotments? A. No, sir.

Q. It has not?

A. No. I haven't changed my opinion of the

(Testimony of Donald C. Jones.)

market value of the fee title because of completion of some more allotments.

Q. Have you considered the fact that a purchaser might want to purchase a bunch from these allotments?

Mr. Brett: If the Court please, I will object to that on the ground that calls for incompetent and irrelevant matter. That has nothing to do with the value of this particular property, the fact that some purchaser might want to purchase some of the property and join it.

Mr. Preston: Your Honor, that is not correct. A piece of property, a town lot sitting in a reservoir site, could be of value because it would be susceptible of uniting with the surrounding contiguous territory to form the bed of a reservoir. This is cross-examination.

The Court: The objection is overruled. Go ahead.

The Witness: I have not contemplated the acquisition of [167] a large number of these allotments by any particular individual as increasing the value or depreciating the value. I have considered, if all of Section 14, or even the westerly half of it, were all upon the market, it would have a deflating effect upon the market value of all properties in Palm Springs.

Q. (By Mr. Preston): Was that your testimony at the last hearing?

A. I don't believe I was asked regarding that matter.

(Testimony of Donald C. Jones.)

Q. Did you testify on that subject, if you remember?

A. As to the placing of Section 14 on the market?

Q. Yes.

A. I don't recall that I did. Perhaps I did.

Q. I don't hear you.

A. I don't recall, Judge Preston, if I was interrogated regarding the placing of Section 14 on the market.

Q. All right. I will see if I can find it for you. I will show you page 245 of the printed transcript, which is a reproduction of Exhibit 8. Read beginning with the last question on page 245, and read from there down to question two from the bottom of page 246.

I will ask you if I didn't propound these questions to you and if you didn't give these answers:

"Q. If the entire Section 14 were thrown open to free market and sale, what would be your opinion as to the value, then, of a two-acre tract situated therein [168] such as this one in question?

"Mr. Brett: Your Honor, I understand my objection has been overruled?

"The Court: Yes.

"The Witness: I would hardly be prepared to voice an opinion as to what the value of the land might be, if it were all cleaned up of the present environment that is there and also for development, for the expansion of the Palm

(Testimony of Donald C. Jones.)

Springs business center. It is reasonable to assume that the prices would be higher. As to how much higher they would go rapidly, I cannot say. There is a large area there and the development of the Palm Springs business district would not be reasonably expected to absorb it so fast that prices would greatly increase over—in my present opinion, however, I think they would go up.

“Q. (By Mr. Preston): There is a great demand, is there not, for business property in Palm Springs, at this time?

“A. Well, there is a demand which has somewhat slackened off, but there has been quite an active demand, yes, sir.

“Q. It still obtains to a substantial degree, does it not?

“A. Yes, very high prices for property are being [169] paid, for property on the main street.

“Q. Very high prices are being paid now?

“A. Yes, sir.

Did you give those answers to those questions?

A. Yes, I did.

Q. Isn't that a complete change from the statement you have just made?

A. I hardly think so, Judge Preston.

Q. What is the difference?

A. The prices which are paid for property on the main street are still high. The price which

(Testimony of Donald C. Jones.)

might be paid if all this property were put on the market, I think would be problematical.

Q. Didn't you say, Mr. Jones, that prices would rise in this Section 14?

A. I think it is reasonable to assume some of them would. I don't think they would rise all over the area, Mr. Preston.

Q. Didn't you say already; since you have been on the stand at this hearing, that it would be demoralizing to the prices?

A. Yes, if the entire section were placed on the market. That was my opinion when I gave this answer.

Q. You think those two statements harmonize, do you?

A. I think they harmonize to the extent of inquiring [170] here about whether there might be some expansion of business area in Section 14.

Mr. Brett: If the Court please, at this time, while I think the matter is a matter for cross-examination, I would move to strike it as being incompetent and irrelevant, and upon the basis of the California law, as fixed in the case of *City of Los Angeles v. Geiger*, reported in 94 Cal. Appellate 2d, page 180, at page 190, and in 210 Pacific 2d, page 717, at 724, in which the court of last resort of this State says as follows:

“Moreover, the valuation of the property and the damages thereto should have been determined in view of physical conditions actually existing on the date the value was required by law to be fixed, and

(Testimony of Donald C. Jones.)

not with reference to a hoped for or conjectured prospective event or to conditions as they might be if changed thereafter, nor even with reference to what was then reasonably foreseeable in the future."

Now, if the Court please, these questions are on an assumption that an entire change be made in the entire allotment system and all allotments be wiped out and that the property thrown on the market as unrestricted property.

In the first place, it is something that is extremely remote, and certainly speculative, but even assuming it were, under the settled law in this jurisdiction, which I believe [171] this court would follow, as far as substantive law is concerned, it is not a proper element of value, and I move to strike it out.

Mr. Preston: That is not in harmony with the decision of this case and is undoubtedly erroneous, because the very elements of market value are that you consider all the uses for which the property is adaptable, and it might be adaptable to a use that it is not being put to at this time, and it might in a very short time be used for that very purpose. So it is the adaptability.

If his construction were accepted, it would negate the very definition the witness gave of market value.

I say this is proper cross-examination of this witness. There is nothing before the court, anyway.

Mr. Brett: In answer to that, the Supreme Court of the State of California, in the case of

(Testimony of Donald C. Jones.)

Long Beach City School District v. Stewart, reported in 30 Cal. 2d at page 763, has squarely held that adaptability in the eyes of the law from the standpoint of market value means availability at that time and under conditions then existing.

It is true, as Judge Preston says, you may consider not only that which is actually being done, but that which is potential, but you may not consider that the potentials exist only if conditions have to be changed. In other words, you are not bound by what use is being made and you are not [172] required to disavow from consideration matters which are capable of being done, but if it requires an act of some other body or something that will change either the physical or legal condition, and something that is conjectural, as it is here, because your Honor will take judicial notice of the fact that to wipe out the allotment system you would have to have some means to take that away from the Indians, and to remove the restrictions and to clear the thing out—that is the purport of his question—and under those circumstances I submit respectfully it is not a material or relevant matter in this case and I move to strike it out.

Mr. Preston: It is cross-examination to test the opinion of the witness, if your Honor please, and is admissible for the purpose of showing whether or not he has given full effect to the proper definition of market value.

The Court: The motion to strike will be denied.

Q. (By Mr. Preston): When it came to the

(Testimony of Donald C. Jones.)

five-acre tract, what adaptability did you consider with reference to that tract?

A. That the frontage of the five-acre tract on Palm Canyon Drive was available and immediately usable for residential development; that the rear portion of the tract would be available and immediately usable for use as trailer park; that the entire five acres could be subdivided into residential tracts. [173]

Q. Any other use?

A. I don't think of any higher use, Judge Preston.

Q. That, in your opinion, is the highest use of the five acres, is that right?

A. That is my opinion, yes, sir.

Q. Had you assumed it had a water right?

A. It has a water right and has city water available, also.

Q. Take the 40-acre tract. You said yesterday there was no water available there.

A. There is no water immediately available to the property. It would have to be brought to it.

Q. If you assumed that water was available there, then would your figures go up or down?

A. I assume that the water—By “available” perhaps we are not in accord with what I meant. The property has a water right, but there is no water immediately available to it. It has to be brought to it at the expense of the developer.

Q. Why is it worth only \$1,500.00 an acre more

(Testimony of Donald C. Jones.)

or less, when the five-acre tract is worth \$7,000.00 more or less? What makes the difference?

A. The difference is, the five-acre tract can be immediately developed. The 40-acre tract is so far removed from any accessibility that roads must be built and the entire thing has to be developed from the ground up. It lies out in [174] the center of a wash area. Flood control would have to be provided, roads built, all utilities would have to be brought to the property, and it is not, in my judgment, now ready or ripe for any such development.

There are too many other lands more favorably situated, which are not by any means even 50 per cent sold out.

Q. What use is it best adapted for?

A. It has potential adaptability for guest ranch development and residential desert site development.

Q. Both residence, and what kind of ranch?

A. Guest ranch, residential.

Q. And subdivision, too?

A. Yes, on a larger scale, in five-acre tracts, we will say. I think the development of it into small lots for residential use is very remote.

Q. If it were located immediately east, say, of the five-acre tract, would it have better value than it has now?

A. The closer it would be to development, the better would be its values, yes.

Q. It is near, is it not, to the highway, another

(Testimony of Donald C. Jones.)

highway there? What is the distance from the state highway that borders the north boundary of that section? A. 2600 feet.

Q. 3600 feet? A. 2600 feet. [175]

Q. 2600 feet. Mr. Jones, your employment by the Government is more or less regular, is it?

A. I have had considerable employment by the Department of Justice.

Q. Over a period of about how many years?

A. Well, I have been employed by them off and on over the past 10 years.

Q. Ten years. Have you any other clients, or does the Government take up all your time?

A. Yes, sir, I have a great many other clients.

Q. What proportion of your time do you give to the Government service?

A. I would estimate perhaps 20 per cent.

Q. You estimate it is 20 per cent?

A. To the Federal Government.

Q. When did you start as an appraiser?

A. In 1927.

Q. What makes one piece of property comparable to another when you are fixing valuations?

A. What makes a property comparable to another?

Q. Yes. What factors are comparable when you are comparing two pieces of property? What factors must be present to make their comparison legitimate?

A. They must have similar environment, sim-

(Testimony of Donald C. Jones.)

ilar topography, similar uses and [176] adaptabilities.

Q. There is no property, then, around Palm Springs that is comparable with the two acres in Section 14, except other property in that section, is there?

A. Because of environment factors, that is true, but as to other factors, they are comparable, as to location, possible uses.

Q. But you haven't allowed for anything else except the development around this property and the use that is being made of it now, and the income that is coming out of it?

A. My problem was to appraise the present market value of the property and I am unable to foresee what might happen in the far distant future affecting value.

Q. Perhaps I am not making myself clear, but I am trying to find out if, in your opinion, there is any comparable property outside of Section 14 to compare this property to.

A. There are other properties which are comparable in all respects, their environment factors excepted, yes, sir.

Q. All except the environment, and except the use that is being made of them, and the income that is coming from them? A. Yes.

Q. The three things you used in your value of the two acres are not present in any other locality, are they?

A. Oh, yes, the other factors are present. The

(Testimony of Donald C. Jones.)

income possibility, the use possibility, but not the environment of [177] the dilapidated shacks.

Q. Then the devastating environment is not present at any other place, is it?

A. No, it is not.

Q. Therefore, this property stands practically alone, does it not, in your estimation?

A. In that sense, it certainly does.

Q. And you don't know of any real standard to measure it by, then, do you, other than what you have mentioned?

A. I don't know of any real standard to measure it by other than its income stream, which is in excess of what it might be were it removed from it.

Q. Do you recognize it would be feasible for the business district of Palm Springs to move east?

A. Yes, I think it will gradually move east.

Q. In that event, this property might be taken and utilized for a different purpose?

A. Not in the foreseeable prospect.

Q. Answer my question first.

A. That is my answer.

Q. You think it would take a long, long time?

A. It would be, in my judgment, a long time before it would be business property. I think the growth of business will be on Arenas Street, the main east and west street.

Q. It is true that west of Section 15 there [178] is a mountain, is there not? A. Yes.

Q. A big mountain?

(Testimony of Donald C. Jones.)

A. A big mountain lies west of Section 14 and lies west of the business district about a mile to the base.

Q. Well, we don't want to give up the golf course.

A. There is a mountain there.

Mr. Preston: That's all, Mr. Jones, as far as I am concerned.

Mr. Brett: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Preston: May it please the Court, I have had a disappointment. I had an expert that said he would be here yesterday for sure, and I thought yesterday morning, and certainly yesterday afternoon. He has not shown up and he is not here today.

I have in the courtroom a witness who testified in the Lee Arenas hearing, that made an investigation of the Lee Arenas property and also this property, because this property is absolutely contiguous to the Lee Arenas property and every tract joins. In investigating that, he had to necessarily investigate this, and with the court's consent I would like to put him on the witness stand.

The Court: You may do so. [179]

Mr. Preston. Mr. Gallagher, will you take the stand, please?

JOSEPH A. GALLAGHER

called as a witness by and on behalf of the petitioners, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Joseph A. Gallagher.

Direct Examination

By Mr. Preston:

Q. Mr. Gallagher, you are a resident of the City of Los Angeles? A. I am.

Q. And you have a profession that you follow. What is it?

A. I am a licensed real estate broker and an appraiser, and president of the American Right of Way and Appraisal Contractors.

Q. That company that you last mentioned is a concern organized by you? A. Yes, sir.

Q. How long has it been in existence?

A. About five years.

Q. And what is the business of that concern?

A. We specialize in the appraisal of properties for governmental agencies, governmental bodies, and utility [180] companies, and then in the acquisition of rights of way for both governmental bodies and utility companies.

Q. Do you keep a staff of employees and experts in your organization? A. I do.

Q. About how many have you at the present time?

A. On our pay roll at the present time, we have

(Testimony of Joseph A. Gallagher.)

about eight, but we have a great many others who are on constant call, for instance, surveyors and engineers on certain jobs.

Well, for instance, we just completed a 600-mile deal for Standard Oil Company in Utah, Idaho, Oregon, and Washington. We didn't have to bring any engineers in on that job, because Standard's engineers did that work, but in some instances it is necessary, and that is when we bring them in.

Q. Give us a brief narrative of your experience as an appraiser, particularly your connection with the public bodies of this State and Nation, say, over the last 10 or 15 years.

A. I did appraisal work for the Department of Water and Power in the City of Los Angeles in the '30s in the construction of or for the construction of Boulder Canyon transmission line from Boulder Dam.

Also for water supply which the department proposed to bring in from a location north of Bishop, somewhat in the general area of Levining.

Then we did several other jobs for the department at that [181] time.

Q. What other public body have you done appraisal work for?

A. I have done work for the Department of Finance and the State of California, quite a few appraisal jobs for the department.

The United States Treasury, San Francisco office, called me in on a job somewhere in the general location of Pismo Beach. That was on a ship-

(Testimony of Joseph A. Gallagher.)

yard, San Francisco shipyard, that had been taken over by the Department. I didn't do too much work on that. However, I was called in to appraise machinery.

The County of Ventura, I handled the appraisal and the acquisition of rights of way of Matilija Dam and Casitas Dam, and also for the Ventura River levee, from the ocean back to the oil field, which was a distance of approximately two and a half miles. I appraised all that property.

Q. Did it comprise both rural and business?

A. Yes, we had business properties there. There were service stations and motels and some business houses and some groves, and then some raw land, too, like the Taylor Ranch in Ventura County, a very large ranch, possibly one of the largest ranches in Ventura County. We didn't appraise the ranch. We appraised quite a large taking strip along the Ventura River levee, which was formerly a part of the Taylor Ranch.

The widening of Foothill Boulevard in Pasadena, we [182] appraised that for the City of Pasadena, with the State of California having an interest in the widening of the boulevard itself. We appraised and acquired the right of way.

Rosecrans in Compton, the same situation prevailed there.

With Standard and with the Texas Oil Company, I have already mentioned the 600-mile deal for Standard through those neighboring States. There was a 175-mile deal in the early '40s, from

(Testimony of Joseph A. Gallagher.)

Kettleman Hills to San Francisco, and several other jobs in Los Angeles County.

With the Texas Oil Company, there was about a 96-mile acquisition through Kern County, Fresno, Tulare, Stanislaus, and a few other counties.

Associated Oil, approximately 26 miles in Santa Barbara County, in the general area of Gavota Pass, with the waste water disposal districts. These districts reach all the larger oil companies in Southern California. We represented the district in the area of Signal Hill, water coming from the wells that must be disposed of in a particular area.

Also, the Santa Fe Waste Water Disposal District, we represented them in a couple of instances, and we are representing them at the present time.

The Southern California Gas and Southern Counties Gas, we appraised and acquired rights of way for the Big Inch gas line, which originated in Texas and New Mexico. However, our appraisal work started at the Colorado River east of [183] Blythe and terminated in Santa Fe Springs, Los Angeles.

Q. A distance of how many miles?

A. About 267 miles, more or less. I may be somewhat incorrect.

Q. Did that take you near the Palm Springs area?

A. Yes, it did. We were north of the Palm Springs area. We were north of the highway over near One Thousand Palms. After we left Indio, we were on the—well, it worked back into the

(Testimony of Joseph A. Gallagher.)

mountains between Indio and Banning and Beaumont. We were about two and a half miles north of One Thousand Palms, for instance, north of the Alonzo Bell property and Hidden Springs Ranch. That is Charley Doyle's property.

As I say, that terminated in Los Angeles, but it took in the Palm Springs area.

We have done—when I say “we,” I like to use the word “we” instead of “I”—we have done a considerable amount of appraisal work for the Southern California Edison Company. As a matter of fact, I believe we do most of Edison's appraisal work. In the last year, I believe we have done 35 or 40 appraisal jobs for Edison. Here recently we completed about a 39-mile appraisal for the proposed construction of a transmission line along the San Gabriel River in Los Angeles County, both sides. We are now negotiating and acquiring the rights of way for this transmissison line.

We are doing work now—we didn't appraise, however, but [184] we are acquiring properties in four different areas. The newspapers call them “slum clearances.” That is the Housing Authority of the City of Los Angeles. We are working on two of those projects. Our contract calls for four, for appraising the entire area of four of them. One we are working on is Rosehill. I had a call this morning on the Aliso Pico, which is over on First Street. We are preparing, and we are ready to start on that. They want us to start tomorrow.

(Testimony of Joseph A. Gallagher.)

That, in general, Judge, takes in some of them. There are more, but that is general.

Q. I assume you have been pretty busy.

A. I have been awfully busy, and it has been hard to come to court.

Q. Are you a graduate of a university?

A. Yes, a Catholic university.

Q. What is it? Notre Dame? A. Yes.

Q. That's a good school. What degree did you take at Notre Dame?

A. I had my bachelor's and master's there.

Q. Were you ever sent by the City of Los Angeles to visit any other States which involved appraisal work?

A. Not exactly appraisal work, Judge.

Q. I won't dwell on it, then.

A. I was sent by the Department of Water and Power, I [185] believe it was in 1934, and, well, there were quite a few assignments that I was given at that time, in Phoenix, Arizona; Sullivan, Missouri; Wheeling, West Virginia; Ashland, Kentucky. I went as far as Wheeling, West Virginia, and then worked back in Milwaukee, Chicago, and Kansas City.

Q. What really was your main object there?

A. In acquiring rights of way, rights of way, that is, for the Boulder Canyon transmission line. At Knoxville, Tennessee, it was on a damage suit that was brought against the city. The purpose of that was to locate a certain party and bring him back as a witness.

(Testimony of Joseph A. Gallagher.)

The following year the department sent me up to Victoria, British Columbia, and Vancouver, British Columbia.

Q. Have you told all the experience you have had in appraisal work in or near the Palm Springs area prior to the time I am about to question you on?

A. There was a little job I did in Palm Springs that didn't amount to too much. Dolores Hope was interested in buying some property. I don't remember now which section that property was located on. I did at the time I testified in 1947. I believe it was the first investment that Dolores herself made, and she did that irrespective of Bob at the time.

Before she bought, I did appraise those lots. I forget what she paid.

Q. Have you been acquainted with the City of Palm [186] Springs and watched its growth and development?

A. Yes.

Q. I will ask you whether or not, at the request of the petitioners in this case, consisting of Oliver O. Clark, David D. Sallee, and myself, you made an appraisal of certain property in Palm Springs.

A. I did.

Q. What properties were they?

A. Those are the properties in the name of Lee Arenas, located in Sections 14 and 26, four acres, two acre parcels in Section 14, and 94 acres, more or less, in Section 26.

Q. I show you Petitioners' Exhibit No. 10. Can

(Testimony of Joseph A. Gallagher.)

you point out the relation between the property you specifically appraised at petitioners' request, and the property in question here today?

A. Yes. Lots 46 and 47, which are north of Lot 50, the Brown property. Lot 47 is contiguous. It is immediately adjacent and north and parallel to Lot 50, the Brown property.

In Section 26, I appraised 39 and 40, immediately north of the Brown Lot 41. Those were five-acre parcels.

Then there were some 10-acre parcels and some 20-acre parcels, and I believe a 40-acre parcel in there. Yes, there was a 40-acre parcel, which appears to be adjacent to and immediately west of the Brown 40-acre parcel.

Q. In making the appraisal that I am about to ask you [187] about here, for the Lee Arenas properties, we will call them, did you not also examine the Brown Arenas properties, the ones in question here?

A. Particularly, no, Judge, because I had no reason to examine that at that time, but I did examine the general area there, and I believe my inspection and survey work in 1947 somewhat covered the Brown property on account of the proximity of the Brown acreage.

Q. Do you know any distinctions between the properties and the ones you appraised?

A. I do not.

Q. As far as you know, they are exactly similar, are they not?

A. My answer would be yes.

(Testimony of Joseph A. Gallagher.)

Q. Please tell the court just what you did to prepare yourself for an evaluation of these properties.

Mr. Brett: May I ask a couple of questions on voir dire, your Honor, in view of the last answer?

The Court: You may.

Mr. Brett: The witness has said he did not examine these——

The Court: You may examine. Go ahead.

Voir Dire Examination

By Mr. Brett:

Q. Mr. Gallagher, your appraisal of the Lee Arenas [188] parcels was in 1947?

A. That is correct.

Q. Have you been back to the property since that date? A. I have not.

Q. Had you ever made any appraisal in the City of Palm Springs prior to the appraisal of the Lee Arenas properties?

A. I mentioned Dolores Hope, those three lots. I will say, Mr. Brett, that I was in Palm Springs with some of the appraisers for the U. S. Engineers, the Corps of Engineers, when some of those properties were acquired there.

Q. When some of the Government property was acquired?

A. That's right. I didn't appraise, but I was down there and I was consulted on some of those appraisals.

(Testimony of Joseph A. Gallagher.)

Q. That was in the period prior to 1945?

A. That is correct.

Q. In fact, it was approximately 1942?

A. Approximately 1942.

Q. But with the exception of appraising some three lots for Dolores Hope—when was that, with reference to 1947? Before or after?

A. That was before 1947. I should say about 1946. I believe I am correct there. It was either 1945 or 1946.

Q. Then, as I understand it, with the exception of the fact that you accompanied some government men who were appraising some land in 1942 in the Palm Springs area, and one visit [189] to Palm Springs to appraise some two or three lots for Dolores Hope in 1946, and the appraisal you made in 1947, you have had no further activity with reference to Palm Springs?

A. Except with the Big Inch gas line that came through the Palm Springs area, north of Palm Springs, however.

Q. How far north from Palm Springs, about?

A. I should say, if we use Ramon Road as a pivot point, and I had time, Mr. Brett—

Q. Isn't it approximately seven or eight miles?

A. I will give it to you. I want to get my directions, because I am trying to go back three years in memory now, with all the other appraisal jobs I had, and I don't want to make a mistake or give any misconception whatever. If you will kindly

(Testimony of Joseph A. Gallagher.)

bear with me, I will try to straighten myself out, as best I can.

I should say about eight to eight and one-half miles north, or eight to eight and one-half miles east. I got my direction somewhat wrong.

Q. Since this 1947 appraisal of the Lee Arenas property, you have not returned to that area to make an appraisal? A. That is correct.

Q. And you have not personally visited the site of any of these properties since 1947?

A. That is correct.

Mr. Brett: If the Court please, I respectfully submit [190] the witness is not qualified to express an opinion of value either in 1948 or 1950, whichever date is selected.

Mr. Preston: This report he made and appraisal he made bears the date of December 9, 1947. That is less than six months before the date we have here, the 18th day of May, 1948.

The Court: The court will state the objection may be overruled. That will go to the weight given to the witness' testimony. The objection is overruled. Go ahead.

Q. (By Mr. Preston): Go ahead with what you did to prepare yourself for the expression of an opinion as to the market value of these properties since 1947.

A. In 1947, I visited the Arenas properties and walked on the properties. That is on Section 14. I did not walk over the entire area, but I did walk in from Indian Avenue by these old buildings that

(Testimony of Joseph A. Gallagher.)

are on Section 14. I did the same thing in Section 26.

Then I drove east on Ramon Road to Sunrise, north on Sunrise—Sunrise is the easterly boundary line of Section 14. Then north, I believe, to Alejo, which is the northerly boundary line of Section 14. I drove around the section, looked at improvements in the sections close to Section 14, and to Section 26.

Then I went to the County Engineer at Riverside and secured a zoning map and a use map. I believe I got my use map from the county engineering department. [191]

I talked to the Water Engineer at Riverside. His name, I cannot remember now.

The Assessor's office at Riverside, we did considerable work in the Assessor's office, trying to ascertain what in their opinion the market value of property was in Section 14 and Section 26, and received considerable information from them.

Then the City Engineer at Palm Springs, and one of the banks, talked to the manager of one of the banks. I am awfully sorry I don't remember these names. I like to be so well prepared, but unfortunately I am not right now.

I did talk to the manager of one of the banks there. Talked to the Chamber of Commerce, the City Manager of Palm Springs. I talked to a great many people around Palm Springs.

I talked to brokers and to some property owners.

(Testimony of Joseph A. Gallagher.)

I believe at the time I talked to Mrs. McManus. I am not quite sure of that.

I visited some of the dude ranches to see what particular type of construction was on these dude ranches and how close the ranches were to the two sections that I am referring to.

I made a study of Palm Springs, the location of Palm Springs in relation to its distance from Los Angeles and from the border of Mexico and also from Indio, on different border lines, and found between Palm Springs and Indio there were several communities that had grown up just recently. [192] That would be south of both Section 14 and Section 26.

These communities were Cathedral City and Palm Village, and there were a couple of others in there.

I ascertained that Palm Springs was on the main line of the Southern Pacific Railroad and is serviced by the railroad and by Greyhound busses, Greyhound busses several times a day. The city is also serviced by transcontinental and local air lines.

The general geographic location of Palm Springs and climatic conditions, the rainy season, and whatever considerations an appraiser pays particular attention to.

I found that there are several, not only nationally, I believe, but internationally known places around the Palm Springs area. For instance, the Palm Canyon, which is noted for prehistoric Washington palms, or something of that nature. That

(Testimony of Joseph A. Gallagher.)

is six and a half miles south of Palm Springs. Andreas Canyon Road for the palisades, the palms, and old Indian caves. Chino Canyon for the water springs, and several other canyons.

That entertainment was furnished by some very well established places of entertainment. I have a list of them. The list is quite numerous.

That there are a great many hotels in Palm Springs. I ascertained the location of the hotels, the number of rooms, and the rates charged. [193]

For instance, the Ambassador Hotel—I won't go into all of them, because I have quite a list—the Ambassador Hotel at 640 Indian Avenue, the rates are \$40.00 double and \$22.50 for single, and there is a swimming pool——

The Court: Why is it necessary to go into those matters to show qualification? We will be here for a month if you keep on this way.

Q. (By Mr. Preston): What did you do about comparing values of property?

The Court: Why go into all those specific things?

Mr. Preston: No, I will not.

Q. What did you do with reference to examining other pieces of property?

A. I examined quite a few properties in order to establish comparability, to find out what the properties sold for, and in many instances I investigated the assessed value of those properties.

I did that for this reason. I have quite an assessed valuation schedule. I believe there are 66

(Testimony of Joseph A. Gallagher.)

of them. I realize that the assessed valuation doesn't represent market value. However, I believe that the offices of the county assessors in the State of California have a very fine idea of market value, and when they assess the property they assess at a certain percentage of market value. That belief of mine is supported by this fact—— [194]

Mr Brett: Just a minute.

Q. (By Mr. Preston): Perhaps that would be a little further than the question that I have put to you would warrant. Continue with the recital of the properties, if you will, if you haven't finished, that you examined with reference to values.

A. Well, I secured an idea of what properties sold for around Section 14 and also around Section 26.

Q. About how many properties do you think you examined in that respect?

A. Twenty-some-odd properties, Judge. I will have to say, however, that I was not out on all those 20 properties. I was on quite a few of them.

Q. Where did you get your information regarding the properties?

A. The title company in Riverside County, and also in the Recorder's office. I have the I.R.S. stamps on some of those sales, which in a way indicates what the property sold for.

Then, after ascertaining what properties in the general area of the Arenas properties had sold for, or were listed for, I tried to strike an average as to what in my opinion was the fair market value

(Testimony of Joseph A. Gallagher.)

of the two-acre parcels in Section 14 and the five and ten acres and forty acres in Section 26.

Q. Did you compile a written report in connection with [195] those services? A. I did.

Q. And it is on file in another division of this court, in the Lee Arenas case, now, is it not?

A. Yes, sir.

Q. Your report is as of what date?

A. I believe December 9, 1947.

Q. At that date you had an opinion, did you, and expressed it, as to the market value of each of these Lee Arenas parcels? A. I did.

Q. And what was the value of the two two-acre parcels in Section 14?

Mr. Brett: Of Lee Arenas?

Mr. Preston: Yes.

Mr. Brett: I object to that as irrelevant and immaterial.

Mr. Preston: That is adjoining property, and I am going to prove value. This is the same location.

The Court: Overruled. Go ahead.

The Witness: May I have the question, please?

(The question was read by the reporter.)

The Witness: \$20,000.00 an acre.

Q. (By Mr. Preston): That would be \$40,000.00 for each two acres?

A. That is correct. [196]

Q. And what would be your opinion as to the value of the two acres immediately south of these two lots you have just described?

(Testimony of Joseph A. Gallagher.)

A. \$20,000.00 an acre.

Q. In other words, they are, in your opinion, of the same value? A. That is correct.

Q. What opinion did you express with reference to the five-acre tracts belonging to Lee Arenas in Section 26? A. \$13,200.00 an acre.

Q. \$13,200.00 an acre? A. That is correct.

Q. And there were two of such lots, were there not? A. Yes.

Q. Two five-acre lots? A. Yes.

Q. There is what is known as the Brown property immediately south of those two five-acre lots. What would be your opinion of the value of that as of that date?

Mr. Brett: If the Court please, I am going to object to that because the witness said in the first place he hasn't examined it, and, in the second place, he hasn't said it is the same type and character.

Mr. Preston: It is the same type and character.

Q. What is your opinion? [197]

A. As I remember, Judge, it is the same type and character.

Q. The same thing, and it is immediately south of one of the five acres, is it not?

A. That is correct.

Q. And do you know of any difference in value between the one and the other? A. I do not.

Q. Your opinion would be, then, it was of the same value as each of the other five acres?

A. That is correct.

(Testimony of Joseph A. Gallagher.)

Q. Did you express an opinion at that time on the so-called two 40-acre tracts that belonged to Lee Arenas? A. \$9,500.00 an acre.

Q. Are you familiar with the location of the Brown property, Brown Arenas property, the one in suit here, the 40 acres?

A. In the same manner as with the two acres and the five acres. I believe it is typical property.

Q. You think the value would be the same per acre? A. I do.

Q. That would be \$9,500.00?

A. \$9,500.00 an acre.

Q. \$9,500.00 an acre. Are there any further reasons why you formed these opinions that you desire to state, any [198] of the reasons that prompted these values?

They seem to be going into that with other witnesses, and you may have that privilege, if you like.

A. I believe that more or less covers it, Judge, except as I made my study at that time in examining Section 11, which is immediately north of Section 14, and Section 10, which is northwest of Section 14, Section 15 immediately west, on examining the sections around Section 14 and also the two sections, 25 and 27, east of and west of Section 26, I tried to pay particular attention to the zoning in those sections, looking rather carefully at the zoning in Section 14 and also the zoning in Section 26.

Section 11, immediately north of 14, is built up with substantial structures and is zoned, for the

(Testimony of Joseph A. Gallagher.)

most part, R-1, which is somewhat different from R-1-A in Section 14.

There are quite a few small areas zoned C-2-R-4, R-4 hotel locations.

In other words, I looked at the zoning in sections around 14 and saw that the properties had been built up in a substantial manner. Namely, Section 11 north of 14 was built substantially; Section 23 south of 14 was being built substantially, as it was when Paul Trousdale went in there and bought more or less 150 acres and put on it 72 units.

I am satisfied in my mind that what prevailed north and what happened south must of necessity in time happen between [199] these two developments.

The same conditions on the sections east and west of 14, the same condition in Section 26.

So that was my analysis.

Q. What in your opinion is the highest use for which Section 14, the area in question here, is adapted?

A. Single-family residences for that property, that is, for the two acres, the two Brown acres we are talking about. It is zoned R-1-A, which allows single-family residences. They may be two stories in height, if necessary. That would develop rather attractively in single-family residences.

Then, with the securing of additional acreage there, it could develop into a rather attractive development unit with residential income units and

(Testimony of Joseph A. Gallagher.)

with some business property, some business sites established on the development, the same as we have in all these tracts in Southern California, or most of the tracts in Southern California.

I personally would like to see it develop under its present zoning of R-1-A, with a little business area located somewhere in the general area of this property, and that could be done.

Then, in Section 26, where the five acres are and the 40 acres, that is zoned R-1, and it is also zoned T for trailer park. There are quite a few trailer parks in Palm Springs and they are making [200] money.

I would like to see the five acres and the 40 acres, with additional acreage, developed into a nice residential area.

I don't think I am mentally exaggerating what my analysis is, because several miles east there are a few tracts right in the wind belt and where the sandstorms are excessive. Those tracts have been sold out, and if they can develop a few miles east without anything around it, I can't see why they can't develop this.

Trousdale sold his out without any trouble.

Q. Do you have any further reasons for your opinion?

A. I believe that just about encompasses what I had in mind.

Mr. Preston: Cross-examine.

Mr. Brett: Your Honor, could you take about

(Testimony of Joseph A. Gallagher.)

a three-minute recess? I think I can save time on my cross-examination, if you will.

The Court: We will recess for ten minutes.

(Short recess.)

Mr. Brett: Your Honor, I am going to take just a minute. I want to explain why I want to go over his former work.

The Court: Is this cross-examination now?

Mr. Brett: Yes.

The Court: Go ahead.

Cross-Examination

By Mr. Brett:

Q. Mr. Gallagher, you testified at some length as to [201] your previous activities. Your activity in connection with the acquisition of a right of way in the Boulder Dam area was over in the State of Arizona, is that correct?

A. Nevada and California.

Q. Nevada and California? A. Yes.

Q. Approximately how far from Palm Springs?

Mr. Preston: What point?

Mr. Brett: Any point.

The Witness: Let's say starting at Boulder Dam?

Q. (By Mr. Brett): Yes.

A. Mr. Brett, you asked me those questions before and I gave you my answers then. At that time I was well prepared. My distances are in that report. I should say Las Vegas is about—don't hold

(Testimony of Joseph A. Gallagher.)

me too tight to these distances—Las Vegas is about 250 miles from Los Angeles, and Palm Springs about 109 miles from Los Angeles. Maybe between 200 and 275 miles away, that is, Las Vegas itself.

San Bernardino, we came through San Bernardino, through the hills at San Bernardino, and as we worked into Los Angeles——

Q. What is the nearest point to Palm Springs in that activity?

A. I should say San Bernardino.

Q. That would be about how far? Well, do you know whether it is better than 80 miles? Isn't it? [202]

A. I don't know.

Q. And that activity was for the purpose of acquiring a right of way? A. That is correct.

Q. Not any fee property, but a right of way on property? A. That is correct.

Q. You stated you had some activity for the U. S. Treasury office, the San Francisco office of the United States Treasury, at Pismo Beach. That is in San Luis Obispo County?

A. That is correct.

Q. And it was approximately how far from Palm Springs?

Mr. Preston: Objected to as immaterial.

The Court: Overruled. You have gone into these matters.

Q. (By Mr. Brett): Isn't that at least 250 miles from Palm Springs?

A. Yes, I would answer to that.

Q. Then you stated you had some activities in

(Testimony of Joseph A. Gallagher.)

connection with various dams, the Matilija Dam and the Casitas Dam in Ventura County?

A. Yes, sir.

Q. Ventura County is north of Los Angeles County? A. About 65 miles.

Q. And that is approximately 125 to 150 miles from Palm Springs, is it not? [203]

A. Approximately.

Q. Your Ventura River levee would also be at least that distance from Palm Springs?

A. That is correct.

Q. Then you stated you had some employment in connection with the widening of Foothill Boulevard. Foothill Boulevard is a boulevard that runs in both Los Angeles County and San Bernardino County? A. Yes.

Q. Where was your activity?

A. In Pasadena.

Q. That would be how far from Palm Springs?

A. I would say 100 miles, more or less.

Q. That was the acquisition of a right of way?

A. No—yes, more or less. It was the widening of Foothill Boulevard. That is correct.

Q. Now, then, you stated you had some employment for the Associated Oil Company at Gavota Pass in Santa Barbara County. That is in the northern part of Santa Barbara County, isn't it?

A. It is between Pismo Beach and Santa Barbara. It is about 35 miles north of Santa Barbara.

Q. And that is about—

A. 109 miles, about the same distance from Los

(Testimony of Joseph A. Gallagher.)

Angeles that Palm Springs is from Los [204] Angeles.

Q. In other words, it is over 200 miles from Palm Springs? A. That is correct.

Q. You stated you had some work in connection with some pipe line commencing at the Colorado River east of Blythe. Blythe is right on the Colorado River at the east boundary of the south part of California? A. That is correct.

Q. It would be about how far from Palm Springs?

A. Well, oh, I should say about 175 to 200 miles.

Q. That was for a pipe line right of way?

A. That was the Big Inch gas line.

Q. To bury a pipe in the ground?

A. That is correct.

Q. You said that you were employed in connection with the transmission line along the San Gabriel River. That is in Los Angeles County just a few miles from this court house?

A. Yes, sir.

Q. That is about how far from Palm Springs?

A. About 100 miles.

Q. You also stated you were employed in connection with some slum-clearance project. As I understand, you have just started upon this work?

A. No. We have been on Rose Hill.

Q. And Rose Hill is not very far from this court house? [205] A. No.

Q. How far?

A. About three miles, three or four miles.

(Testimony of Joseph A. Gallagher.)

Q. How far from Palm Springs?

A. About 105 miles.

Q. And both Rose Hill and Aliso-Pico you referred to are right in the heart of Los Angeles City?

A. That is correct.

Q. You stated you did go to Palm Springs at one time in behalf of Dolores Hope, and I understand she is the wife of Bop Hope, the movie and radio actor?

A. Yes, sir.

Q. Did you go there as her agent, merely to indicate to her what she should or should not buy?

A. Dolores was interested in buying some property in Palm Springs, and before she bought she wanted to know whether or not the location she had in mind was the correct location, and asked me if I would go down and see if I could find something for her, which I did.

I talked to Culver Nichols and I asked Culver to pick up a couple lots for Mrs. Hope in a location which in his opinion would have a future valuation, a location where the property values were increasing, and one of the brokers in his office—I can't remember his name—was the one who found the three lots and told me what the price was, and I [206] recommended to Mrs. Hope that she should buy those lots.

Q. That was your activity in that regard?

A. That is correct.

Q. You stated in making your appraisal of these properties you were relying upon the appraisal that

(Testimony of Joseph A. Gallagher.)

you made of the contiguous properties in the Lee Arenas case? A. Yes, sir.

Q. And you had fixed a value in 1947 for the Lee Arenas separate units, and you fixed your valuation of these based upon that valuation?

A. That is correct.

Q. And under the method that you used in that particular appraisal? A. That is correct.

Q. First, let me ask you this: Do you know and can you state under oath today whether or not the two-acre parcel of Della Brown has a wash across it?

A. Would you mind repeating the question? Give me one at a time.

(The question was read by the reporter.)

The Witness: May I have it as, "Do you know whether there is a wash?" I am confused with the other there, the "Do you know and can you state under oath."

Q. (By Mr. Brett): Oh, I see. Do you know whether it has a wash across it? [207]

A. I do not.

Q. You mean you don't know one way or another?

A. I do not. May I explain my answer, your Honor?

The Court: You have answered. You said you do not know. Don't keep going on with this argument between witness and counsel. We will never get through with this lawsuit. Just answer the

(Testimony of Joseph A. Gallagher.)

question, and if they don't like the answer, they can ask you another question.

Mr. Brett: Your Honor, I am not arguing with the witness.

The Court: Go ahead.

Q. (By Mr. Brett): Do you know whether there is a wash across the five-acre parcel?

A. I don't think there is a wash across the five-acre parcel. I think there is a sort of a surface drainage in there, a surface wash condition, just on the surface. It is not a big wash like that wash that goes across the Trousdale property, which is 200 feet wide. I think it is just a general topographical wash condition across the five acres.

Q. Is it your recollection that there is any such wash across the Lee Arenas five-acre parcel?

A. No, sir.

Q. You stated as a part of your preparation you contacted the County Assessor at Riverside?

A. That is correct.

Q. Riverside is the county seat of the county in which [208] Palm Springs is located?

A. That is correct.

Q. Was the County Assessor in Riverside able to give you any information as to assessed values in either of these two sections that were a part of the Indian reservation, Section 14, in which the two-acre parcel lay, or Section 26, in which the five- and forty-acre parcels lay?

A. I received no information as to assessed values of properties in Section 14 and Section 26.

(Testimony of Joseph A. Gallagher.)

Information on assessed values was on properties on the surrounding sections.

Q. You received information that those particular properties were not assessed for taxation?

A. That is correct.

Q. You stated you did get the assessed values of properties which surrounded Section 14 in all four directions?

A. Yes, sir.

Q. To the north was Section 11?

A. That is correct.

Q. To the west was Section 15?

A. That is correct.

Q. To the east was Section—what was the number there?

A. 13.

Q. Sir?

A. 13.

Q. 13. And to the south was Section 23? [209]

A. Section 23 to the south, that is right.

Q. First you found that all four of those sections were not Indian reservations, but were white-owned sections?

A. Yes, sir.

Q. Section 11 was highly developed with one of the principal hotels in Palm Springs, the El Mirador, and with many homes of wealthy people, is that not correct?

A. That is correct.

Q. Section 15 was developed with the principal motel in Palm Springs, the Desert Inn, and you found it was assessed at a valuation of \$900,000.00, didn't you?

A. The Desert Inn property?

Q. Yes.

A. I don't remember whether or not I even

(Testimony of Joseph A. Gallagher.)

checked the assessed valuation of the Desert Inn property.

Q. You found it also had the principal business thoroughfare in Palm Springs, Palm Canyon Drive, Section 15? A. That is correct.

Q. And that it contained many business properties and many homes of wealthy people?

A. That is correct.

Q. Section 23 contained the Biltmore Hotel property, one of the finest hotels in the area, at the south end and along the state highway?

A. That is correct. [210]

Q. And contained the Deep Well Ranch, another extensive development? A. That is correct.

Q. And it contained other developments of a high-class character? A. Yes, sir.

Q. And Section 14 contained the race track and an amusement area, as well as the airport?

Q. Yes, and there were some subdivision lands in Section 13 from Alejo Road to McCallum Way, and south of McCallum Way to Baristo Road.

Q. Is it not true, also, Mr. Gallagher, you took the assessed values irrespective of whether the particular piece was or was not improved, and you came to what you deemed to be an appropriate and proper total of the assessed value of 11 at so many dollars as the assessed value of that entire section?

A. We are considering the vacant land, aren't we, Mr. Brett? I did not give any weight whatsoever to the assessed value of the improved property.

(Testimony of Joseph A. Gallagher.)

Q. You took assessed value of vacant land in that section? A. Yes.

Q. Which was improved with many fine homes?

A. That is correct. [211]

Q. You took the value of 15, which included the business district? A. That is correct.

Q. And you took the assessed value of 13, which included the airport and the race track area?

A. That is correct.

Q. And you took the assessed value of 23, which included the fine hotel, the Deep Well Ranch, and other properties?

A. That is correct, plus—Pardon me.

Q. Go ahead.

A. All right. Plus some sales and also some listings.

Q. In other words, you get your figures both from assessments and from some listings and some sales, and arrived at a general value, in your opinion, of these four sections?

A. That is correct.

Q. Then you added the four sections together and you came to a total, didn't you? A. Yes.

Q. Then you divided by four?

A. That is correct.

Q. And then you determined that Section 14 had 640 acres in it? A. Yes, sir.

Q. And you determined, in your opinion, because Section 14 was in part being used by what you considered not an [212] advantageous use, shacks, and so forth—you learned that, didn't you?

(Testimony of Joseph A. Gallagher.)

A. Yes.

Q. You depreciated Section 14 to a certain percentage because it had shacks on it?

A. That's right.

Q. And then you took this X, divided by four, and divided that by 640, and arrived at the average value per acre, didn't you?

A. Ultimately, and may I answer—

Q. That is what you did, isn't it? A. Yes.

Q. Now, Mr. Gallagher, you had also to evaluate Section 26, didn't you? A. Yes, sir.

Q. 26 had the 25- and 40-acre parcels?

A. Yes.

Q. Section 26 had Section 23 above and to the north? A. Yes, sir.

Q. And had a section to the east of it, that was 27? A. 25.

Q. 25. It had a section to the west of it, that was 27? A. Yes, sir.

Q. Was there any section below it?

A. There was. I don't have the number of that section [213] below it.

Q. There was a section here we will mark "X" below. You did precisely the same thing in reference to the properties in 26? A. That is true.

Q. Determined in your opinion what the average value of the four surrounding sections was per acre, by first fixing the—based upon assessed values, some sales and some listings, you formed your opinion of the value of that whole section?

A. That is correct.

(Testimony of Joseph A. Gallagher.)

Q. And then you added the four sections together and divided by four?

A. In this instance, three.

Q. You disregarded this one? A. Yes, sir.

Q. You divided by three and you came to an average acreage value? A. Yes, sir.

Q. You didn't depreciate this property because you didn't consider it had the disadvantageous use, so by dividing by three, you then divided by 640, and came to an acreage value, didn't you?

A. Yes, sir.

Mr. Brett: That's all. [214]

Redirect Examination

By Mr. Preston:

Q. Is that all the factors that entered into the proposition?

A. I mentioned, Judge, I had considered some sales in that area there, what property sold for in those sections, and what property was listed for. Not only the assessed valuations, but also I combined the assessed valuations with listings and also sales, and the balance was—I was satisfied in my mind that I was correct and I was correct in my approach.

Q. You checked your computations?

A. I did.

Mr. Preston: That's all.

Mr. Brett: That's all. Thank you.

(Witness excused.)

Mr. Preston: That is our case. [215]

Mr. Brett: Your Honor, I would like at this time in behalf of the Government and the Indian to read into the record part of the opinion of the Honorable William C. Mathes in Case 1321-O'C, which is the Lee Arenas case, and which appears in the record in this case as a part of the Plaintiff's reply brief filed on April 13, 1948.

This has reference, your Honor, to the question which you ultimately have to decide on, whether or not the 1940 contract was void or valid, and also whether or not, by virtue of that fact, it tied in Eleuteria Brown Arenas, so that she also has to pay the fees for what Lee Arenas did.

Mr. Preston: This is part of my brief here.

Mr. Brett: Yes.

Mr. Preston: Why do you want to read my brief in the case?

Mr. Brett: Because I want to get it in the record.

Mr. Preston: It is not a part of the case. It is a good argument.

Mr. Brett: It is a transcript of the opinion of the Honorable William C. Mathes in 1321-O'C.

Mr. Preston: I object to reading the opinion, because it is not proper. It is hearsay. We would have to have the judge in here and talk to him, cross-examine him about it maybe.

Mr. Brett: This is an official opinion filed by a judge of this court in that case. [215a]

Mr. Preston: It doesn't make any difference. It isn't evidence.

Mr. Brett: Of course, I don't want to offend, unless your Honor rules. I want to offer it in evidence and read it. I will say for the benefit of your Honor, so you can determine what I am trying to get at——

The Court: If it is an official opinion, why shouldn't the court take judicial notice of it?

Mr. Preston: It would be good reading in chambers.

The Court: I have enough of that in chambers. I don't want any more than I have to have. But, anyhow, I will take judicial notice of that. The court should, I think. These two cases in some way are connected.

Mr. Brett: Then, if the court please, I will offer it by reference.

The Court: It will be admitted.

Mr. Brett: I particularly direct the court's attention to that part in which the court expressly holds that that contract was void. That is what I am offering it for.

Mr. Preston: The court held that the attorneys were bound by the contract. It is void as against the government, perhaps, but binding upon them.

The Court: Will you proceed?

Mr. Brett: Miss Singer, will you take the stand, please? [215b]

RITA SINGER

called as a witness by and on behalf of the respondents in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Rita Singer.

Direct Examination

By Mr. Brett:

Q. What is your profession, Miss Singer?

A. I am a lawyer.

Q. In what states are you admitted?

A. In the State of Michigan and the federal courts.

Q. Will you speak up as loudly as you can, because Judge Preston has difficulty in hearing and so do I?

Mr. Preston: I did not get the state.

The Witness: Michigan.

Q. (By Mr. Brett): By whom are you employed?

A. I am employed by the Department of the Interior, in the Bureau of Indian Affairs.

Q. For how long have you been in that employment?

A. I have been in the Department of the Interior since 1944 and have been working for the Bureau of Indian Affairs for the last three years, since 1947.

Q. What is your particular employment at the present time? In what office are you located? [215c]

A. I am now the Aera Counsel for the State of

(Testimony of Rita Singer.)

California, which is an area of the field office of the Bureau of Indian Affairs, and I am also the counsel for the Carson Indian Agency, which covers most of Nevada.

Q. Under your particular field of activity is the Palm Springs Reservation?

A. Yes, it is.

Q. In connection with such work and activities, has it been necessary for you to investigate the law and to form opinions and render opinions as to Indian law respecting these reservations?

A. Yes, of course.

Q. And with reference to trust patent allotments or allotments for trust patent?

A. Certainly.

Q. And allotments, both tribal and in severalty?

A. Well, there aren't any allotments tribally. Do you mean trust patents?

Q. Yes. A. Yes, of course.

Q. Have you also, as a part of your activity, been required to and have you come into information as to whether or not there have been any transfers of the rights of the Indians, which we term the allotment, under a trust patent in severalty?

A. Would you read that question to me again, please? [215d]

(The question referred to was read by the reporter.)

Mr. Preston: Your Honor, I have no objection

(Testimony of Rita Singer.)

to introductory questions, but I can't see the materiality of where this subject is leading. If it is a matter of what the law is, some of the rest of us might have an opinion about that.

Mr. Brett: Your Honor, the question is a little awkward and I will revise it, but it is leading to this. I believe I will be able to show by this witness, in addition to the legal presumption, that we have to show the thing could be sold, that this particular entity or trust patent under the law can be sold and has been sold from time to time. In other words, that it is a marketable product.

Mr. Preston: What is a marketable product?

Mr. Brett: A trust patent right.

The Court: Go ahead.

Mr. Brett: I did not make my question clear.

Q. Do you have knowledge of instances in which the trust patent rights of an Indian for an allotment in severalty have been transferred as such?

A. Yes. There are transfers both to Indians, to non-Indians, and to groups of Indians, that is, tribes of Indians.

Mr. Preston: Just a minute. To which we object unless it is cited it is with the consent of the Secretary of the Interior or his representative.

Q. (By Mr. Brett): Was it with the consent of the Secretary? [215e]

A. It was with the consent of the Secretary or his authorized representative, either the Commissioner or the Area Director, whoever had the authority to approve.

(Testimony of Rita Singer.)

Mr. Preston: Then I object to it as being immaterial. Certainly they can sell it with the consent of the Secretary of Interior or his authorized agent.

The Court: Well, if you agree on that, the answer can stand. Overruled.

Mr. Preston: I don't contend she can't sell it with his consent.

Q. (By Mr. Brett): Have you prepared a definition of an allotment based upon your research and your experience in this particular field?

Mr. Preston: To which we object, that her preparation of a legal opinion would not be of value to the court.

The Court: Sustained.

Mr. Brett: I don't know. I realize it is not binding on the court, but we have an expert here.

The Court: Sustained. There is no use introducing anything that is not binding on the court.

Mr. Brett: That's all.

Mr. Preston: That's all. Thank you.

The Court: You may be excused.

(Witness excused.) [215f]

The Court: We will recess until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock.) [215g]

Wednesday, November 29, 1950. 2:00 P.M.

The Court: You may proceed.

Mr. Brett: Your Honor, the Government and the Indian are ready to rest, with the exception that I would like to make certain motions to strike.

The Court: Make them now.

Mr. Brett: If this is the proper time, I will make them now.

The Court: I said I want to close this case sometime.

Mr. Brett: First, so that the record may have a motion in our behalf in the event that your Honor makes a determination, after considering the case, that the proper measure to be determined as the antecedent for the fixing of the fees is the value of the Indian's interest, and that the value of the Indian's interest is the value of her interest in the trust patent, then I move to strike the testimony in the record other than the testimony on value as to the Indian's interest and other than the testimony with respect to the value of attorneys' fees which, of course, are not contingent on that.

Secondly, if the court determines, after considering the evidence, that the 1940 contract between David D. Sallee individually and Lee Arenas does not entitle these three petitioners to receive compensation in this particular case for the work performed under that contract and in behalf of [216] Lee Arenas in Case 1321-O'C, or, in the alternative, if the court determines for other reasons, and particularly for those stated in your original opinion in this case, that they have been or are going to be

compensated in a separate proceeding for those very services and are therefore not entitled to receive compensation in this case for that part of the services which were delineated in the hypothetical question put to the lawyer witness, Mr. Martineau, which referred to their work, efforts, and all other matters with reference to their activities in the Lee Arenas case, 1321-O'C, then I move to strike the opinion expressed by the witness Martineau upon the ground that it is an opinion expressed upon a hypothetical question which included incompetent and irrelevant matters.

Third, I move at this time to strike the opinions expressed—not the rest of his testimony, but the opinions expressed—by the witness Benton Beckley, on the grounds, first, that he expressly admitted that he used assessed values as a part of such opinion and as an integral part thereof, and he expressly admittted he evaluated the market value upon the basis of conditions which were to be changed and as of the time of that change, that is, when the changes had been completed, as distinguished from the present existing conditions, and that, having considered both of those matters as integral portions of the basis upon which he expressed the [217] opinion, that the opinion itself must fall.

Lastly, I move to strike the opinions of value only as stated by the witness Joseph Gallagher upon the grounds, first, that he expressly admitted that an integral part of his testimony was the use of as-

sessed values, upon which he predicated his ultimate value.

Secondly, that he expressly admitted that his determination was made by an incompetent method, to wit, by taking the gross values estimated of other sections, by adding them together, by dividing them by the number of sections, and then by in turn dividing that cost by the number of acres in the particular section in which he was evaluating the property, which was an incompetent method of arriving at value, and since he expressly stated both of those matters were integral parts of and in fact the substance of the final opinion expressed, that the opinion is improper and should fall.

Now, with your Honor's permission, in order not to take time, I would like to supply my memorandum in support of those motions as a part of the brief which we will file with your Honor.

The Court: The court will reserve ruling upon your motions until the case has been finally submitted and considered and there is a final conclusion of the court.

We will get down now to the gist of the court's conclusions in this case. As I understand the mandate of the [218] Circuit Court of Appeals in sending this case back, I am to determine by fixing a definite amount in money to be paid, if any, to the petitioning attorneys. In other words, they concluded that this proceeding should hear and determine a definite amount to be paid to counsel, the petitioners here, in money. Otherwise, they said they affirmed the decision of this court in all re-

spects, except as to one item of cost, something between \$15.00 and \$100.00. Those are the reasons they sent this case back to me.

I want to consider and see whether or not the court understands the Circuit Court of Appeals in sending it back, not to reverse the court in allowing attorneys' fees in some amount or other, but directing this court to fix the amount in money.

That would involve, of course, it may be, the value of the property and the amount of the services rendered by counsel, the petitioners. I am not passing on that now, but I say those circumstances appear under this record of the Circuit Court of Appeals in this particular case. That is what I want you to bring out, both sides, and I would like for you to inform me what you contend is the value of each of these parcels, the two acres, the five acres, and the 40 acres, I want you to say what you contend is the value in your briefs. If you do that, it will help me.

I just suggest to counsel that those thoughts run around [219] my mind.

Mr. Brett: Yes, sir.

Mr. Preston: It is your Honor's idea that this matter be submitted on briefs?

The Court: You may do that or you may argue now, but I want it finally on briefs.

Mr. Preston: I want to make a few statements.

The Court: You may go ahead now, if you want.

Mr. Preston: I don't want to trespass on the court's patience, or time, either, but this is a case in which the speaker before you now, your Honor,

occupies a double position, one of attorney and one of personal interest.

That prompts me to state to this court that myself and my associates, the other petitioners, do not want any unfair advantage of the Indian in this case. We have served without compensation for these ten years, seven on my part and ten on their part. That is in the kindred and this case together. We have been paid nothing. We are even out expenses to some extent.

All we want is the fair judgment of this court, which we know we will get, and when we get that we will be satisfied.

I stated in the early part of this trial that in my opinion the Government never had the least idea of allowing its ward's property to be sold for its own dereliction. Every court that any branch of this litigation has been in [220] has condemned the action of the Bureau of Indian Affairs in its conduct of matters connected with this allotment proceeding. Therefore, I figure and feel, although I have nothing but my so-called hunch, that they do not intend for a moment to permit this property to go to the auction block. If they shouldn't, and I am confident of that, if they have the slightest concern for the welfare of the Indians, that they will not permit it, that is another reason why I want the court to be reasonable, and if there is any error, err against us rather than the Indian and the United States.

This opinion of the Court of Appeals is a little puzzling as to what the duties of the court are here.

It says that, as a factor in assessing our fees, you should consider and determine, that is in the opinion, the value of these properties. But in the judgment and in the mandate, the word "determine" is not used with reference to values. It is used with reference to the amount of attorneys' fees, but it is not used with reference to the amount of the value of this property.

I may be wrong, but I feel that all you need to do is to find an approximate value or a value beyond which it should not go and a minimum value beyond which it should not drop. I believe that would satisfy the ruling of the court. I may be in error on that, and undoubtedly this court will give very careful consideration to what its duty is in [221] that connection.

I remember Judge Mathes several times during the trial of the Lee Arenas case uttered a similar sentiment to that which I have just expressed.

When you come to the value of this property, I believe, as I have argued it to this court during the trial of this case, that it is the value to the Indian, that the market value is only used as an indicator of what to arrive at as the actual value to the Indian. Of course, that is offhand and that is not after any particular study of the authorities, but that is my view of it.

The Indian's title is a subject that your Honor is familiar with, I know. I have written a new brief on it, and I have sent for it to come up here during this proceeding, if it gets here in time. But I don't think we need to stop to dwell too long on

that, because it is in the opinion in 181 Federal 2d, at page 62, the Lee Arenas opinion. There is foot-noted practically every case that undertakes to discuss and to define the Indian's interest. I have added to that *Chapman v. Schrap* [*Choate v. Trapp*],* which holds that the Indian's allotment is a vested interest and is protected by the Fifth Amendment.

So I say that the Indian's title in this case is a full and equitable title, and the United States is a guardian with no interest in the property, no proprietary right or estate in it, with no conflict of duties between any other function [222] of the Government and the Indian, but confined solely to what is the best interest of the Indian, she being a member of a dependent people.

That is even stated in the opinion in this very case, that the sole duty of the Government is to protect the Indian, and these restrictions that have been talked about here in this case are presumably for the benefit of the Indian and are to be exercised when, as, and if it is deemed by the guardian in good faith to be for his best interest.

So that by the nature of his title, this proposition of the market value of his title conveyed to an outsider, with the consent of the Government, is an absolute absurdity on its face. It couldn't be, because if the Indian transfers all the title he has, and the Government consents to it, the full title

*[*Choate v. Trapp* appears in pencil longhand over *Chapman v. Schrap* on original.]

has passed to the purchaser, and the restrictions about leases and contracts are forever gone, because they are subordinate to and contained within the compass of the legal title.

So when you put a witness on the stand and ask him what is the fair market value of the Indian's interest on the basis of making a sale of that type, I say you have accomplished nothing. It is a fraud on its face. It is *felo de se*. Where I come from the argument destroys itself. I take it the court will have no trouble whatever in deciding that item as any measure of value in this case. [223]

Now, the measure of value, therefore, left is the opinion of one set of witnesses against the other, and what is the cause of the difference in opinion? The cause of the difference of opinion, in my belief, your Honor, is simply this: That the Government's two experts, Evans and Jones, have declined to consider anything further than the present plight of these lands, weighed down by these shackles that are on there, which are put there under Government permit, tribal permits O.K.'d by the Government, I should say, to be more exact. Such values based on the present surroundings, the present development, and the present income, are a travesty on the rules of market value.

Market value is supposed to be based on all the potentialities of the property, and you have seen that by the location of this property, by the surroundings to the west and to the north and to the south, that this is the road of expansion of the business area of Palm Springs. Any witness who

refuses and fails to take that fact into consideration has expressed an opinion based on omitting material elements that should have engaged his attention. That is the reason for the difference of opinion.

The opinion of Mr. Beckley as a realtor and broker down there, a property owner, is based upon the theory Palm Springs is backed up against the San Jacinto Mountains on the west and must go over and traverse these properties to expand [224] at all. Upon that expansion, of necessity they have fixed the market values of these properties, and I think they are sound. They are the market values. Whether they are too much or not is a question the court will have to wrestle with.

I feel personally it is the only way you can get at it, but I also feel it is not in itself an exact way of doing it. I have to be frank to any court in my own conscience, in saying that, that I don't think the market value is anything but the surface guide.

I say that for this reason, your Honor. The Indian, with his property in the hands of an honest guardian, acting solely for his interest, would permit a sale of the property if it was to the best interest of the Indian to do so. If it is not to the best interest of the Indian to do so, and the Indian is required to keep his property, in my judgment it must be held that the property that is kept would be of equal value to these property prices if it were sold. That is my argument. I haven't borrowed it from anyone else. It is only a generation of my small intellect. But that is the way it looks to me,

that the market value is the equivalent of the value to the Indian of his allotment.

These restrictions we discussed here and that were put in the hypothetical question are restrictions to be used only where the Indian is not able to care for himself and is practically in the state of a minor or an incompetent person. [225] Where the Indian is competent, it is the duty of the Government not to exercise any of these restrictions, unless such as provided by law, and, of course, he couldn't override them, but it is the duty of the Government as guardian to give consent to a fee patent, for example, if the Indian is prepared to take it.

That the Indian is prepared to take the allotment has been determined in this case, and it is also determined by a statute in 1917, when this Bureau was directed specifically to begin the making of allotments which have not yet been completed in this case.

So we have the proposition that the property in the hands of the Indian is presumably worth just as much as if it was in the hands of any other trustee, and as if the Indian were a white man with the intellect of an average human being, and some of these Indians meet that full standard, in my opinion.

With that preliminary, your Honor, I haven't much to add to this. I can't resolve the question as to how much.

All I am asking you to do is, when you come to the fees of Preston and Salee and Clark, to give

the consideration that you would give to any other problem and give them the reasonable amount that you think is just, and let us have all errors, if any, in favor of the Indian, err against us rather than against the Indian. [226]

This question of striking these things out here, I don't think I need to discuss that here. The witness Martineau, however, said that his opinion of value would be just the same as if the Lee Arenas case had not been taken, but if some third person, some third lawyer, who had not been in the Lee Arenas case, had prepared this case, that the fee he gave here would be the fee he would give a lawyer, and we had a right to use our knowledge and our skill, whatever we have, gained from whatever source, in the conduct of these proceedings here before you, and he never asked you to double-pay us in any sense of the word. He disclaimed any such intention or purpose to do so.

With those remarks, your Honor, I shall have to tell you there are five or six different elements that enter into the fixation of a lawyer's fee. They are set up in the brief I filed before you already, and you will have to either make an approximation or a full determination of what the value of the Indian's interest is in this allotment.

The Court: You set that up in your brief as to what the evidence shows.

Mr. Preston: I will do that, your Honor.

The Court: I would like to get the views of counsel on both sides as to what this evidence

shows, what is the value of each one of these three tracts here.

Mr. Preston: You asked me that, and I haven't given you [227] too much light yet.

The Court: I am going to give you both time to file final briefs.

Mr. Preston: I can say only that the market value of the fee title is the best guide to what the value is to the Indian.

The Court: We have got two lines of evidence here.

Mr. Preston: And I can't resolve a conflict like that. I have only pointed out to you that one is based on the status quo, demoralized, debased value, due to the fact that the Indians have had no title and couldn't make one, and they have allowed a lot of slum shacks to go up on the property, and the Government witnesses want to value it in that condition, and I say that is not the test. Therefore, I regard those values as not on the proper basis. They haven't included the items that should be contained in their opinion.

As for ours, it may be bigger than you think it ought to be, but I think it is the nearest thing to it we can get.

Mr. Brett: Your Honor, I also want to supplement my remarks with a brief, but both to assist Judge Preston in his brief and to indicate to the court briefly the Government's and the Indian's position, I will take a few moments.

First, we have this proceeding based on a mandate of the Court of Appeals. I, too, agree that,

in addition to not being satisfied with some of the decision which is now final, [228] I have some difficulty in interpreting the mandate. However, the best interpretation I can give, and which I expect to enlarge upon, is this:

I feel that we can assume that the Court of Appeals at least read the record. If the Court of Appeals read the record which has been introduced in this proceeding as Exhibit 8, the Court of Appeals definitely had before it the fact that this court heretofore had had presented to it two types of evaluations, and at that time you stated you had some difficulty in determining what to do about them. Like you, I am also guided by what the Court of Appeals ended up with.

You avoided that and determined it on a percentage basis, which did not require you at all to determine market value. In other words, you allowed a percentage of whatever might be the value of the lands. That, of course, is now out, because the Court of Appeals has rejected it.

I say the Court of Appeals will be deemed to have known that, because it is a part of the record. In the light of that, it is my interpretation that when they send it back and say that this court should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted lands under the trust patent, it seems to me that they point out that the thing to be evaluated is that interest, in other words, the trust patent interest. [229]

Therefore, it would be the Government's position, not the Indian doesn't have a vested right—we have conceded that—but that the nature and character of the vested right is that of a trust patent, and that has certain limitations which affect value. In other words, that is what the attorneys have recovered for the client, and it will be our contention on the matter of a reasonable value on a quantum meruit contract, that is the most that the attorneys can have.

May I say parenthetically, I recognize, in fact, I think I have had one or two cases in my own practice as a private lawyer before I worked for the Government, and I recognize it not only is lawful, but there are occasions when an attorney may both earn and can have a fee which will be in excess of the intrinsic marketable value of what he recovers for the client. There are certain times a client wants to establish a principle, something of that kind. But it is my view, and I will endeavor to support it in the brief, that such a matter is not one you can consider under a quantum meruit contract.

In other words, I think the quantum meruit contract has to be based and limited at its topmost by what you recover for your client.

The next thing that I believe the mandate of the Court of Appeals has stated is that after you fix that as a factor, then, in the light of that value of that which the lawyers [230] have achieved for the client, and applying all of the principles of fixing the value of a lawyer's service, you then fix what

in your view is the reasonable value of the services they performed for the client.

Here I will say to you I believe, and I shall expect to urge in my brief, that it certainly should not be the equivalent of what they recovered for the client. Or, putting it another way, I don't think the fee allowed the attorneys should be the equivalent of everything the Indian got, so that the Indian wouldn't have anything left.

As to that measure, I believe that the memorandum Judge Preston filed with you recites a case that gives some six points, subject to review, because I got them on the run, but that comports pretty closely with my understanding of the various factors the court may properly consider. I realize, and I think Judge Preston would agree, that primarily is in the breast of the court, because of all the people we might produce who would have any basis of determining the reasonable value, I think your Honor would be best equipped, because in the main a judge will determine more cases and pass upon the efforts of more attorneys than any one lawyer will in his career. So that we decided not to put any expert testimony in by any lawyer. We believe your Honor can make that decision in a very fair way.

In that connection, however, we shall urge this. First, [231] I do not believe that any part of the work that was done in a separate case under a separate written contract, which does not in any sense include this Indian that is here the plaintiff and now the respondent, which does not name her

either directly or indirectly, should be considered as a part of the services rendered in this case.

Secondly, and I say it in all sincerity, your Honor, I hope to convince your Honor when you have had a chance to give further consideration to the record in this case, that contrary to Mr. Martineau's statement, the law is so well fixed finally and firmly as to the right of a member of the Palm Springs Band of Mission Indians to get a trust patent, that you didn't have to have somebody steeped and groomed in Indian law to decide that question; that any tyro who would have the ability to analyze law and to make research could have found that factor in a day's time.

I do realize, and I want this clearly understood, I realize that some of the questions that arose on this supplementary procedure, which have astounded me but have now been made the law and have supported your Honor, and you know how I fought it—I did not believe any final court would state in the face of existing law you could put a lien on the allotment. In that work, they have accomplished an astounding thing, and an outstanding thing and an able thing, but I don't believe you can charge the Indian with that. [232] That is something for their own benefit in asking this lien.

In the original case, we had three elements. One, was she a member of the band of Indians? That was fixed, and you didn't have to decide that.

The Government, which was the respondent in the first case, admitted she was entitled to the patent provided she could prove she was an adopted

daughter or someone had had authority to select for her, because the first step in an allotment in severalty is a selection, and a minor as such has no authority to do it. She is not deemed to be competent—he or she.

Those were the only issues left in this case, plus one other, and that is the reason for this so-called abortive appeal or protective appeal. I remember now why we took an appeal. We took the appeal because in the communication in which I confessed judgment I decided we were objecting to an insertion in it, as in the Lee Arenas judgment, of a reserve power to fix a lien on the property. We ultimately decided that didn't make any difference, and we were still protected in the supplementary proceeding, and we dismissed the appeal in one week.

I feel, in fixing the value of the fees in this case, one, you are faced with, what issue in law did the attorneys have to take care of? I submit the only issue of law for the Indian they had to take care of was whether or not she was an [233] orphan, or whether someone who had authority could make a selection for her, because the Government by express statement in VI said if they could establish one or both of two things, she was entitled to all the relief she prayed for, except the reserve power of the lien, which is not for her benefit but for theirs.

Therefore, while I recognize, your Honor, in this other forum, when we got to trial, where the attorneys established again Lee Arenas was entitled to

a trust patent, and there was some question about that, the scope of their fees and their work is entirely different in character from the scope of the work in this case.

The second thing I think your Honor should consider is that after the pleadings were past and the admissions made, as I have stated, to what extent did they have any particular problem and how did they meet it?

No one has higher respect for Judge Preston and his associates than I do, but they are human beings, and sometimes human beings act very effectively and sometimes not very effectively. With the greatest respect for them, I think in this particular case they didn't make a very good presentation, because, really, the only issue to be determined was whether or not there was any legal authority.

That was a matter that would have to be made by resolution or by some writing, and if they had taken a deposition or [234] if they had made any request for admissions, or anything of that character of work which we do in equity of a discovery nature, that matter would have come out.

It is true, also, your Honor, if my fees were being fixed, you would have the same complaint against me here, because of stress of work or because there were some other features of other cases I didn't handle, I lost track of it, or we would undoubtedly never have forced the trial of this lawsuit.

The Government certainly, as far as my knowledge is concerned, in such instances as I have represented it, has never come into this court and

contested something which we knew we had no right to contest. The minute Judge Preston found that, we admitted it.

I say those things should be weighed in the matter of services rendered to this Indian and how much they should be paid. They should be paid a reasonable fee and a substantial fee. But I think the substantiality of it has to be in relation to what they got for the Indian.

That brings up the next point. As you say, we have quite a difference of values. In reference to Mr. Beckley's testimony, I am not talking about personal elements, but his testimony, which you have to weigh. You have before you two types of testimony, and I am going to endeavor to get this written up. You have the testimony in the last day or two, and you have the testimony in [235] Exhibit 8.

I expect to present this in a memorandum of law, and I merely mention that in Exhibit 8 the basis of his testimony was he had been very active in this area, had made a number of sales, and he knew about a great number of sales. I took his deposition, and when we interrogated him here he said he didn't know of a single sale, he didn't know of any sale in the reservation, and he didn't know any sale which he deemed comparable, except a few lot sales.

The conception of Mr. Beckley was this: not that the property as it now stands today or in 1948 had this particular value, but that if in some manner you could completely change the attributes and the

conditions that exist here, so that the property would be in an entirely different position, not only freed of restrictions, because that, of course, was an assumed element of the fee, but also freed of all the environments that belong to others who also had vested rights, and if the City of Palm Springs, as he said it would have to, but hasn't yet, in due course if the City of Palm Springs pushes toward direction and various other changes take place—and bear in mind he said specifically in answer to one of my questions, if not more, he couldn't fix the time, he couldn't estimate the years in time, but he felt positive that is what was going to be done.

There is where Judge Preston and I get to a fixed impasse. It is the fixed law in the federal court, and I know it is in [236] this State, that you can't fix present value on the hypothesis of what the value will be under changed conditions, and, particularly, you cannot do so if the persons who would be the assumed buyer and seller could not control those conditions. That is where you get this availability or adaptability.

As Judge Preston told you, and we can answer everything he said in good faith, he said this whole Section 14 had been allotted in severalty to various Indians. We have exhibited in A and B the fact that these various selections are surrounded by allotments in severalty to different Indians, not to Eleuteria Brown or to anyone she can control, and not anyone the Federal Government can control, because even under those restrictions, which Judge Preston feels are an impairment rather than

an aid to the Indian, the most the Federal Government can do is consent to a change. It can't force a change, because the Indian has the vested equitable right, and he has the right to determine whether he wants to make any change.

In the light of that, we have the testimony of the Government's witnesses, despite the fact that on the face this slum area looks bad, actually it produces more revenue, and we will eventually get to that after your Honor renders his decision, because, as I read the mandate of the Court of Appeals, after you have finally fixed the fees, you have to allow a certain length of time and arrange for payment in that time, I think we will try to go into what the income is, and it may be you [237] will make some arrangements for payment out of income, but I am just mentioning that to tie it up to what the witnesses said.

They said the income from the slum area would be greater than if you required conformance with the zoning ordinance, which limits it to certain residences with an expressed area of 7,500 feet.

As far as Mr. Beckley is concerned, I think the whole matter might be summed up in this. Mr. Beckley was not fixing present values. He was fixing an anticipatory value based on changed conditions, and I don't think that is the appropriate basis to fix value of either attorneys' fees or any other value.

As to this last witness, Mr. Gallagher, of course, Mr. Gallagher should be excused, because it is quite apparent he was being called here without any

chance to refresh himself, and if he had done that he would have declined, I think, to testify as to these parcels. I may be wrong. But certainly the approaches which he described on cross-examination are most alarming.

If you could fix value by taking entirely contrary-type property, property zoned for business and used for business under the highest development, and then arrive merely at some estimate of the value of the 640-acre sections, add them together, divide them by four, and then by the number of acres, [238] and if that is your estimate of value on separate pieces, whether they were inside or outside the perimeter, whether they were open lands or whether they were lands as these, surrounded by many other dwellings of low-class nature, and all other factors of that kind, I submit you get to the point where you have no effective measure of value at all.

It is true the Supreme Court has said market value is an informed guess, but I earnestly believe and I recommend your Honor to consider that word "informed." It is not just a guess, and that is what this last witness' valuation was.

As to the Government's witnesses, you saw them and you will read the record before. Judge Preston stipulated to that and I want you to read it. You will find out from the record that these men had been active in this particular area. Mr. Evans had subdivided property there. Mr. Jones had appraised many other properties in the Palm Springs area, both for others and for Government acquisition in

the area, because we acquired land for a hospital, an airport, military training, et cetera.

In addition to that, Mr. Jones detailed to you various comparable properties. It is true, under the rulings the court had to make, you couldn't get specific prices, but unless you believe the man was testifying falsely under oath, I think you can readily determine and believe he had the information there, and he had it to utilize. [239]

Mr. Beckley didn't have any such information as that, and didn't claim to.

So it seems to me, while no opinion on value can be said to be so firmly based that it is certain, you can't make those things certain, that they more nearly comport to an informed guess as to the value, which is what we term value.

I feel that in this matter the court should fix the value in the light of the Indian's interest. I don't mean to disparage it except to the extent that that is the way it was. That is what these lawyers could recover and the only thing they could recover for the Indian. That is all she would have.

I believe the definition in the hypothetical question will be supported by authorities, and I expect to show every single part of the definition is supported by authorities.

Then I believe your Honor can fix that value, which I think you must under the mandate. A reasonable fee should be fixed for these lawyers, considering what they did and what they were confronted with, but I don't believe, and I say it in all sincerity, I don't believe they are entitled to be

compensated by her for work which they did under a separate contract for someone else, any more than if they would come to some other lawyer that had nothing to do with it, that she would be required then to pay.

Lastly, there is one other thing, and then I am going to close. I can no more prophesy what the United States or any [240] of its executive departments will do than I can prophesy about the moon. I have, however, been with the Federal Government now some twelve and a half years, and your Honor has served honorably many years as part of its judiciary, and for that reason has been aware of the matters I now mention. That is, while it acts in varying degrees, and with sometimes very conflicting ability, and has lots of money, you can't even spend a thin dime unless there is some appropriation from which it can be taken. At the present moment, I say in all sincerity, I know of no funds the Congress has appropriated for the Department of the Interior which can be utilized to pay such a judgment as this. I say that for two reasons.

In the first instance, the first of the Court of Appeals decisions in the Lee Arenas case, the Court of Appeals expressly held it would not be a judgment against the United States, but must be a judgment only as against the Indian. In other words, it would not be such a judgment as would come under the federal statute of an obligation of the United States, which it would have to directly pay.

Secondly, while the United States holds very con-

siderable sums for various Indians, it is my understanding of the law those funds are all held in a trust capacity and the funds belong to or are to be used for the benefit of the Indians, and, therefore, even though our Sacramento office may hold thousands of dollars for the various Indians in the area which [241] it controls, we couldn't reach into that fund and pay this judgment which you will render against Eleuteria Brown Arenas.

It may be, and it may possibly be true, your Honor, that when your judgment is rendered and that of Judge Mathes has been rendered, the Department of the Interior, if it has time, may go to Congress and ask to have funds appropriated. I agree with Judge Preston it would be a terrible thing to have this property sold. One thing I am afraid of is, once this is established, with the amount of lots you have there, the whole area may be sold.

I say, however, in fixing your judgment, you will have to assume at the present time it is going to be enforced in the manner which the mandate of the court and your previous judgment indicated. It will have to be enforced in some form out of this property, and I think that is a proper consideration for the court to take, and that is on a quantum meruit basis that the lawyers' fees, in my opinion, should never equal completely the recovery for the client, else it would seem to me the quantum meruit would be self-destructive and the client would have gained nothing.

I would like the privilege of supplementing these

remarks with a brief at such time as your Honor fixes, and also supplementing my motion to strike with a memorandum of authorities.

Mr. Preston: I don't care to take up but a moment. I should tell your Honor there is pending in this court a case [242] designed to correct the inequities and miss-errors, I will call them, of the Department of Indian Affairs as to every allotment in this area. It relates principally to the question of water that is briefed in the brief I handed to your Honor.

When that case comes to trial and is adjudicated, there will be a benefit conferred upon the property here, upon the Lee Arenas property, and upon all the other properties, and there isn't any reason in the world why the attorneys in this case may not be paid out of the funds that belong to the tribe and that they are collecting from the property now.

I don't care to take the time of the court to reply to the statement of counsel at all, because I don't think that this court needs any education as to how to weigh evidence.

The reference, for example, to my witness, Mr. Gallagher, was not a fair reference. He said that he studied these properties from every possible angle. It is true he used a method that was described by counsel, but he also said, after so doing, he checked it with the sales of other properties, and leases and so forth, and found it to be fairly accurate.

An estimate of value is bound to be an estimate only. It can't be an exact science.

I don't think anything will be gained by prolonging this argument, except I want to say two or three words about the nature of the Indian's title. I have a brief which has been [243] brought to me from my office, and which contains quotations as to the nature of the Indian's property. I will incorporate all of this in the brief which I shall present to your Honor.

The Court: I understand you have closed your oral argument now?

Mr. Brett: Yes.

The Court: The court is going to give you time to file briefs. How much time do you want?

Mr. Brett: Who is to file first?

The Court: The petitioners. They have taken the affirmative side. I should think this would be like any other lawsuit.

Mr. Preston: Have you any suggestions as to limits to be put on the briefs?

The Court: I want to get through with it as soon as I can, while this matter is fresh in my mind. I don't believe in keeping these things for two or three months. I don't want to cramp you for time, either, but if you can get it in in a reasonable time, I will give each one the same amount of time.

Mr. Preston: Will the record be written up?

Mr. Brett: I haven't been able to get Washington, but I am going to try to get authority by phone to have it written up. I will get the part the court asked for.

Mr. Preston: If it is written up, I will want a copy. [244]

The Court: I have tried some cases here this term where they have asked the Department to furnish a copy of part of the transcript and they have said they can't get authority.

Mr. Brett: That is true, and I don't know if I can. I will try to.

Mr. Preston: Since the United States is a party, I should imagine they would do it.

How long are you going to be here, your Honor? Will you be here until the end of this month?

The Court: No. I am going to leave on the 7th of next month. I will have to dispose of this in Boise.

(Discussion between court and counsel.)

The Court: Suppose you each have ten days. Say the petitioners have ten days and the respondent will have ten days thereafter to reply. That will be 20 days.

(Discussion off the record between court and counsel.) [245]

The Court: You agreed you would furnish me the hypothetical question. You can get that all in before the 20 days, and if you get a copy of this much here, it will be helpful.

Mr. Brett: Yes, sir. I am going to try. I haven't got any authority to order the transcript.

The Court: I will commence disposal of the case after 20 days. I will study it between now and then, but I can't wait indefinitely.

Mr. Brett: I will promise everything I can, but

I can't commit myself, because they have said that I can't commit myself until they have authorized it.

The Court: I understand that. I will allow each 10 days if you desire to file a brief. The respondent will be allowed 10 days thereafter to file a brief. That extends the briefing to 20 days.

Mr. Brett: Is it a brief on the law or facts or both?

The Court: It is up to you. Then I will have some definite time when I can commence to dispose of this case.

Mr. Brett: Do I not understand your present ruling this way: Judge Preston has 10 days to file a brief, and if he files it sooner, my time starts, but if he does not file a brief, I can still file a brief provided I get it in within 10 days?

The Court: Yes, but he must notify you, and then I will know the definite time when I can start in and get this case [246] finally submitted. Of course, I will be working on it between now and 20 days, but I won't make any conclusions.

Mr. Brett: My thought would be this, your Honor. If I can get the authority, I want the whole transcript. If I can't get that, I am going to go for the two points I mentioned. If I do get the authority, I will order the whole thing.

The Court: Well, I do want that hypothetical question that you put the other day and your argument and your motions here and the argument today. If you can get copies of those for me, it will help me.

Mr. Brett: As soon as I can get upstairs, I will ask for the authority.

The Court: Maybe you can do it in 10 days. I want to dispose of this before I forget about it.

Mr. Brett: Your Honor has made notes about the value.

The Court: Yes, but there is some conflict. I thought in your briefs, if you will state specifically what you claim the values are under this record of the three parcels, that will help me to check it with my notes.

Mr. Brett: And our reasons as to why you should accept it.

The Court: But keep those separate, each parcel.

Mr. Brett: Yes, sir.

The Court: As I see it, attorneys should be compensated [247] for a reasonable amount for their services in this case. In order to determine that, we have got to go to what was the Indian's interest under this decision of the Circuit Court of Appeals. Then we have to determine what procedure do the petitioners have to pursue to realize that. Those are the questions involved here.

Mr. Preston: It is quite clear, isn't it? If we have to sell, we sell the whole interest in the allotment. That is clear.

Mr. Brett: Yes, there is no dispute. If you have to sell, we have to sell the whole interest.

Mr. Preston: Yes.

Mr. Brett: On that phase, the Department has authorized me at the appropriate time, after you have rendered judgment, to request consideration

of the appointment of a receiver to handle these particular properties and recover income and in line with the mandate to fix a reasonable time before sale to see whether or not it can be worked out to pay it off. In other words, we may find some other way of paying it off.

The Court: I said I would appoint a trustee to go out and find what is the reasonable value and then set a day, keeping jurisdiction here in the court, when you could come in and have a hearing as to what were the reasonable values. The only difference is they have said I shouldn't fix a per cent of the value but I must fix a definite amount of money. There isn't [248] any difference. It has got to be money. The only thing is you have to realize it out of these allotments.

Mr. Brett: I think we will be able to work it out.

The Court: I would like to hear from you on that question of procedure.

Mr. Preston: The Indian's title to this land is determined, as far as I know.

The Court: Well, you do that. Do you have a brief you want to leave?

Mr. Preston: That is the brief I intended to use. I want to use it in the Lee Arenas case.

The Court: I believe that finally submits the matter to the court. I want to say, counsel, I thank both of you for your able assistance to me in trying to arrive at a legal and just conclusion on this hearing. You both have been of great help to me, although I have got to do some further investigating after this procedure here.

I don't think any court ought to have any trouble in determining under the evidence what is the reasonable compensation to be paid to the petitioners here, the attorneys. They have rendered their services and the Court of Appeals recognizes that. They haven't told me how to get it is all. I don't know how it can be paid except in dollars.

Counsel has admitted you are entitled to compensation and it would take a pretty high court to tell me you are not [249] entitled to something for all the work you have done in this particular case. The lawyers haven't been paid a cent. It is a question of how to get it to pay you.

If the Government wants to pass some act paying you afterwards, that is your problem, as to how you are going to get your money.

It is up to me to find the procedure now. If I can impress a lien and give them a right to foreclose, that is a doubtful question. I don't think I will have much trouble in determining the amount of compensation. These fees have got to be paid out of the interest of the Indian. What is that interest? It is the allotment. What is it worth? I have got to determine that interest. That is one of the things to be determined. I have got to definitely fix the amount of the compensation to be paid out of the allotment.

The Indians haven't any other way to pay. They have the equitable title, as you say. It is a question of how it is to be done. I will try and define some procedure the best I can under this, but you haven't

put up any easy question for me. It is a question of procedure.

Mr. Preston: We will tender you a form of decree, if that is what you want.

The Court: Well, now, off the record.

(Discussion off the record between court and counsel.) [250]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 16th day of February, A.D. 1951.

/s/ S. J. TRAINOR,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 126, inclusive, contain the original Complaint for Trust Patent; Answer of Defendant United States of America filed Nov. 25, 1947; Stipulation and Order for the Admission of Evidence; Decision; Findings of Fact and Conclusions of Law filed June 23, 1948; Judgment filed June 23, 1948; Petition for Supplemental Decree for Attorneys' Fees and Expenses Advanced and Other Relief; Order to Show Cause; Special Appearance of and Motion to Dismiss by United States of America; Affidavit of Irl D. Brett; Answer of Eleuteria Brown Arenas filed Oct. 28, 1948; Answer of United States of America lodged Oct. 29, 1948; Opinion filed Jan. 3, 1949; Findings of Fact and Conclusions of Law filed Feb. 4, 1949; Judgment and Supplemental Decree filed Feb. 4, 1949; Notice of Appeal filed Feb. 14, 1949; Statement of Points on Appeal filed Apr. 4, 1949; Opinion filed Jan. 29, 1951; Findings of Fact and Conclusions of Law filed Mar. 2, 1951; Judgment and Supplemental Decree filed Mar. 2, 1951; Notice of Appeal filed May 1, 1951; Statement of Points on Appeal filed May 22, 1951, and Designation of Record and a full, true and correct copy of Minute Order filed and entered Mar. 16, 1949, and of the Docket Entries from January 9, 1947, to March 25, 1949,

which, together with original Petitioners' Exhibits 1 to 10, inclusive, and Respondents' Exhibits A to U, inclusive, and copies of reporter's transcript of proceedings on October 29, 1948, and November 27, 28 and 29, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 6th day of June, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12962. United States Court of Appeals for the Ninth Circuit. United States of America and Eleuteria Brown Arenas, Also Known as Della Nicholson, Appellants, vs. John W. Preston, Oliver O. Clark and David D. Sallee, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12962

UNITED STATES OF AMERICA and ELEU-
TERIA BROWN ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD TO BE PRINTED

The United States of America and Eleuteria Brown Arenas, appellants in the above-entitled case, adopt the statement of points filed in the District Court as the statement of points to be relied upon in this Court, and desire that the whole of the record as filed and certified be printed with the following exceptions:

1. Petitioners' Exhibit No. 8. This exhibit is a copy of the printed record on a prior appeal of this case (No. 12218), and the parts thereof considered material have been individually designated as items 1 and 7 to 20, inclusive, in the designation of record filed in the District Court.

2. Petitioners' Exhibits 9 and 10 and Respondents' Exhibits A, B, and D. These exhibits are maps of the area, and a motion will be made for consideration in their original form.

3. Respondents' Exhibits E to S, inclusive. These exhibits are photographs, and a motion will be made for consideration in their original form.

Respectfully submitted,

/s/ A. DEVITT VANECH,
Assistant Attorney General;

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,
Attorneys, Department of
Justice, Washington, D. C.

Certificate of Service

Service of the foregoing statement of points and designation of the parts of the record to be printed was made on appellees by mailing a copy thereof, via air mail, postage prepaid, on June 19, 1951, to Mr. John W. Preston, 712 Rowan Building, Los Angeles 13, California; Mr. Oliver O. Clark, 710 Knickerbocker Building, Los Angeles 14, California; and Mr. David D. Sallee, 510 Garfield Building, Los Angeles 14, California.

/s/ JOHN C. HARRINGTON,
Attorney, Department of
Justice, Washington, D. C.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF
ORIGINAL EXHIBITS

The United States of America and Eleuteria Brown Arenas, appellants in the above-entitled cause, move this Court for an order authorizing the consideration of Petitioners' Exhibits 9 and 10, and Respondents' Exhibits A, B, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, and S, even though said exhibits are not included in the printed record, such consideration to be the same as if said exhibits had been designated for inclusion in the printed record.

These exhibits are either maps or photographs of the area involved. They were designated as part of the record on appeal so that they would be available for examination or reference in this Court. However, it is not believed that they are of sufficient materiality to justify the expense of reproduction in the printed record.

/s/ A. DEVITT VANECH,
Assistant Attorney General;

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,
Attorneys, Department of
Justice, Washington, D. C.

Certificate of Service

Service of the foregoing motion for the consideration of original exhibits was made on appellees by mailing a copy thereof, via air mail, postage prepaid, on June 19, 1951, to Mr. John W. Preston,

712 Rowan Building, Los Angeles 13, California;
Mr. Oliver O. Clark, 710 Knickerbocker Building,
Los Angeles 14, California; and Mr. David D.
Sallee, 510 Garfield Building, Los Angeles 14, Cali-
fornia.

/s/ JOHN C. HARRINGTON,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed July 2, 1951.

[Title of Court of Appeals and Cause.]

ORDER FOR CONSIDERATION OF
ORIGINAL EXHIBITS

Upon consideration of the motion filed by appel-
lants for an order authorizing consideration of
Petitioners' Exhibits 9 and 10, and Respondents'
Exhibits A, B, D, E, F, G, H, I, J, K, L, M, N, O,
P, Q, R and S, and good cause appearing therefor,
it is hereby ordered that said exhibits shall be used
and considered by this Court upon said appeal with
the same force and effect as though they were in-
corporated in and made a part of the printed tran-
script of record.

So Ordered:

/s/ CLIFTON MATHEWS,

/s/ WM. E. ORR,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed July 2, 1951.

No. 12962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and ELEUTERIA BROWN
ARENAS, also known as DELLA NICHOLSON,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,

Appellees.

Reply Brief for Appellees John W. Preston, Oliver O.
Clark and David D. Sallee.

JOHN W. PRESTON,
458 South Spring Street,
Los Angeles 13, California,

OLIVER O. CLARK,
643 South Olive Street,
Los Angeles 14, California,

DAVID D. SALLEE,
649 South Olive Street,
Los Angeles 14, California,

Attorneys for Appellees.

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No. 12962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and ELEUTERIA BROWN
ARENAS, also known as DELLA NICHOLSON,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,

Appellees.

Reply Brief for Appellees John W. Preston, Oliver O.
Clark and David D. Sallee.

Opinion Below.

The opinion below appears at pages 40-45 of the Transcript of Record. It is not reported.

The opinion of this Court on a former appeal of this proceeding for attorneys' fees and expenses of suit is reported in *United States and Eleuteria Brown Arenas v. John W. Preston, et al.*, 181 F. 2d 69. The opinion of this Court in the companion case of *United States and Lee Arenas v. John W. Preston, et al.*, is reported in 181 F. 2d 62, and is pertinent here since it disposed of similar issues.

Jurisdiction.

The district court had jurisdiction of the suit out of which this action arose under the Act of August 15, 1894, 28 Stat. 286-305, as amended, 25 U. S. C. A., Section 345.

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Questions Presented.

The questions presented on this appeal are:

1. Whether this Court should disregard the law of the case as decided in *United States et al. v. John W. Preston, et al.*, 181 F. 2d 69, and in *United States et al. v. John W. Preston, et al.*, 181 F. 2d 62.

2. Whether the district court complied with the instructions of this Court on remand of the case on the former appeal.

3. Whether the district court erred in fixing appellees' attorneys' fees in the gross amount of Twenty Five Thousand Seven Hundred and Fifty Dollars (\$25,750.00).

Statutes Involved.

The statutes involved are the Act of August 15, 1894, 28 Stat. 286-305, and the amendatory Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. A., Section 345, a copy of which is set forth in appellants' opening brief.

Statement.

The judgment below allowed appellees attorneys' fees in the gross amount of \$25,750.00 for services rendered to Eleuteria Brown Arenas, also known as Della Nicholson, in an action brought in the district court to determine her right to an allotment of lands in severalty, selected by her for allotment, and a trust patent thereto [R. pp. 53-57], said action being No. 6221-PH-Civil, entitled "Eleuteria Brown Arenas, also known as Della Nicholson, plaintiff, v. United States of America, defendant." The judgment in said action adjudged and decreed that Eleuteria Brown Arenas was, on May 9, 1927, and at all times thereafter, entitled to a trust patent to lands, selected by her for allotment, situated in Riverside County, California, on the Reservation of the Agua Caliente Band of Mission Indians, consisting of three parcels described as follows:

PARCEL (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East S.B.M., comprising two (2) acres;

PARCEL (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East S.B.M., comprising five (5) acres;

PARCEL (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ in Section 26, Township 4 South, Range 4 East S.B.M., comprising forty (40) acres.

Said judgment became final, after the United States abandoned its appeal therefrom.

Thereafter appellees filed a petition in said action No. 6221-PH-Civil for a supplemental decree allowing them attorneys' fees and expenses of suit for the services ren-

dered by them on behalf of the plaintiff therein, Eleuteria Brown Arenas. Following hearing of said petition, the district court rendered judgment in favor of appellees (1) allowing them an amount equal to $12\frac{1}{2}\%$ of the value of the lands judicially allotted to her, and \$100 for expenses of suit; (2) impressing an equitable lien on said lands to secure payment of the amount so allowed; and (3) ordered said lands sold, and the proceeds of sale divided, $87\frac{1}{2}\%$ to Eleuteria Brown Arenas and $12\frac{1}{2}\%$ to appellees.

On appeal from said judgment, this Court held (*Arenas v. Preston*, 181 F. 2d 62, *et seq.*): that the trial court erred in fixing the attorneys' fees on a percentage basis; and that the court "should have proceeded expressly to fix the dollar value of the services performed" and "should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration." (*Id.* p. 67.) The Court then stated:

"The case is remanded to the district court with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed. Upon such determination having been made and upon the lien having been accordingly impressed upon the property the judgment shall stand affirmed, except as to proper assignments of error which may be claimed to have occurred in the determination herein ordered."

The judgment of this Court followed almost *verbatim* the above quoted language from the former opinion herein.

On remand both appellants and appellees offered, and the Court admitted, evidence concerning the money value

of the allotted lands. There is sharp conflict in this evidence.

Appellees offered, and the Court admitted evidence as to the money value of the legal services rendered by them for and on behalf of Eleuteria Brown Arenas in action No. 6221-PH-Civil. *Appellants offered no evidence whatever concerning the value of said legal services.*

It is proper to note in this connection that the reasonable value of the Indian's interest in the allotted lands was only "one of the elements to be taken into consideration" by the trial court in fixing the money value of appellees' legal services. (*Arenas v. Preston*, 181 F. 2d 62, at p. 67.)

At the time appellees were working on the *Eleuteria Brown Arenas* case, and even prior to the filing thereof, they were also working on the *Lee Arenas* case. In many respects the work on one was parallel to the work done on the other. The value of the parallel service is in no wise diminished by that fact.

The Court made and entered findings of fact and conclusions of law [R. pp. 45-52], and rendered judgment thereon [R. pp. 53-57] in accordance therewith.

In its findings the trial court found, among other facts, the following:

"That the reasonable value of plaintiff's interest and estate in the allotted lands, under the trust patent decreed to the plaintiff by this court, is as follows:

Parcel (a) Homesite * * *	2 acres	\$ 40,000.00
Parcel (b) Irrigated * * *	5 acres	66,000.00
Parcel (c) Desert * * *	40 acres	60,000.00

Total value of said parcels	\$166,000.00"
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[Finding VI, R. pp. 48-49.]

The trial court further found:

“That petitioners (appellees) * * * rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff * * * for which said petitioners are entitled to receive as compensation the sum of * * * (\$25,-750.00), said amount being the reasonable value of said legal services.” [Finding VII, R. p. 49.]

The Court also found that “it is reasonable and equitable that * * * petitioners be secured by an equitable lien on all of the allotted lands,” and that “plaintiff be allowed a period of six (6) months from the date of the entry of the supplementary decree * * * within which to pay” the judgment. [R. pp. 49-50, Findings VII and VIII.]

Judgment was entered accordingly [R. pp. 53-57], from which appellants have appealed to this Court. [R. p. 58.]

Summary of Argument.

1. Appellants are not entitled to a review of the law of the case as announced in *Arenas v. Preston*, 181 F. 2d 69, and in the companion case of *Arenas v. Preston*, 181 F. 2d 62.

In the former appeals of the cases mentioned the law was thoroughly briefed by appellants and appellees. Appellants' opening brief in the *Lee Arenas* case consisted of 49 printed pages, of which approximately 25 pages were devoted to the discussion of matters pertaining to jurisdiction. Appellees filed a reply brief consisting of 25 pages, of which about 14 pages were devoted to jurisdiction. This Court decided that, under the rule announced in *United States v. Equitable Trust Co.*, 283

U. S. 738, the district court had jurisdiction to grant the relief prayed for in action No. 6221-PH-Civil and in the supplementary proceeding for allowance of attorneys' fees. Thereupon appellants filed petition for certiorari in the Supreme Court of the United States, again devoting the principal portion of their argument to the question of jurisdiction. The Supreme Court denied certiorari.

Thus, the question of jurisdiction has had full consideration by this Court and by the Supreme Court. No good purpose could be served by a reconsideration of the law of the case, nor would reconsideration be in the interests of justice. About 12 years have elapsed since the *Lee Arenas* case was filed, and about 5 years have elapsed since the *Eleuteria Brown Arenas* case was filed. The United States has made an endurance contest out of each of said cases, and persists in a course of unjustified delaying tactics irrespective of the decisions of this Court and the Supreme Court. It certainly should not be permitted to reopen these cases for many years of further litigation. This is especially true, since the original cases were made necessary because of the wilful refusal of the Secretary to issue trust patents to allottees who had duly made selections for allotments in severalty.

2. The district court complied fully with this Court's instructions concerning further proceedings on remand of the cause. The record shows that both appellants and appellees introduced evidence as to the money value of the allotted lands, that the trial court made findings as to such values, and that the value of the land so found was

considered in the making and entering of judgment. The record also shows that the dollar value of appellees' legal services was fixed by the trial court, as directed by this Court. The record further shows that appellants offered no evidence as to the value of appellees' legal services.

3. The district court did not err in fixing the money value of appellees' legal services at \$25,750.00. The only evidence introduced on such value, other than that of appellees, was that of L. R. Martineau, Jr., a well-known and highly esteemed member of the Los Angeles Bar. Mr. Martineau testified that if it be assumed that the allotted lands had a market value of \$300,000.00, the reasonable value of the legal services rendered would be \$75,000.00; if the lands were valued at \$200,000.00, the value of such services would be \$55,000.00; if the lands were valued at \$100,000.00, the fee should be \$30,000.00. [R. p. 97.] On cross-examination by government counsel the witness testified that if the lands were valued at \$41,000.00, the attorneys' fee should be \$20,000.00; if valued at \$30,000.00, the fee should be \$20,000.00 to \$25,000.00 on a contingent basis. [R. pp. 150-152.]

There was ample evidence to sustain the trial court's finding that "the reasonable value of plaintiff's interest and estate in the allotted lands" is \$166,000.00. Counsel fees of \$25,750.00, for the services rendered and on the basis of such valuation and other elements considered are reasonable, and within or below the value of appellees' services as testified to by Mr. Martineau. The fee allowed is approximately 15% of the value of the allotted lands fixed by the decree of the Court.

ARGUMENT.

I.

Appellants Are Not Entitled to a Review of the Law of the Case as Announced in *Arenas v. Preston*, 181 F. 2d 69, and in the Companion Case of *Arenas v. Preston*, 181 F. 2d 62.

Appellants are now contending that this Court should review its former decisions in this case and in the companion case holding that an equitable lien may properly be impressed upon the lands allotted to Eleuteria Brown Arenas to secure the payment of the judgment rendered herein. Such contention is contrary to the rule, commonly called "rule of the case," which forecloses such a review.

It is well settled in California that

"when the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts." (*Penziner v. West American Finance Co.*, 10 Cal. 2d 160, 169.)

2 Cal. Jur. 946, 947, citing scores of cases decided by the California Supreme Court.

This is also the general rule announced by the federal courts.

United States v. U. S. Smelting etc. Co., 339 U. S. 186, 198, 70 S. Ct. 537, 544;

Insurance Group Com. v. Denver & R. G. W. R. Co., 329 U. S. 607, 67 S. Ct. 583, 585;

Messinger v. Anderson, 225 U. S. 436, 444, 32 S. Ct. 739, 740.

“The rule of the law of the case is a rule of practice, based upon the sound policy that when an issue is once litigated and decided, that should end the matter.” (*United States v. U. S. Smelting etc. Co.*, 339 U. S. 186, 198.)

The issue whether the district court has jurisdiction to impress an equitable lien upon restricted allotted lands was squarely presented in the first trial and first appeal of this proceeding for allowance of fees. The trial court and this Court held that such jurisdiction existed. The Supreme Court denied certiorari. It is to be presumed that when a question of jurisdiction is presented to the Supreme Court in a petition for certiorari, that Court would give the jurisdictional question adequate consideration. It cannot be doubted that if this Court or the Supreme Court, on the former appeal, had entertained any doubt as to the jurisdiction of the district court to impress an equitable lien upon restricted Indian lands, under the facts shown, the decisions thereof would have been different.

Appellants suggest that appellees should be required to ask Congress, or the Executive Department, to make some provision for the payment of their fees. The suggestion is cynical and derisive, considering the history of the two *Arenas* cases. The Executive Department, particularly the Interior Department, has in the past hindered in every way possible the making of allotments to the members of the Palm Springs Band of Mission Indians; and it seems now determined to defeat the just claims for compensation of attorneys who, for nearly twelve years, have labored to secure such allotments.

It has been 34 years since Congress directed the Secretary to make allotments to these Indians. The will of

Congress was thwarted for nearly thirty years, and doubtless would have continued to be set at naught if appellees had not rendered their legal services in the suits mentioned to secure justice for the Indians. Frankly, appellees have no slightest desire to be placed at the mercy and caprice of officers who have shown utter callousness and indifference to the rights of appellees' clients.

Moreover, the judgment rendered stands affirmed when and if the proceedings on remand comply with the instructions of this Court. (*Arenas v. Preston*, 181 F. 2d 62, 68.)

II.

The District Court Complied Fully With This Court's Instructions Concerning Further Proceedings on Remand and Retrial of the Cause.

Appellants assert that the trial court acted contrary to this Court's instructions in the matter of valuing the interest of Eleuteria Brown Arenas in the lands judicially allotted to her. The basis of this assertion is that her "interest" in said lands is almost negligible because of the restrictions inherent in a trust patent. The evidence of appellants' expert witnesses was based upon assumptions that restrictions against alienation and leasing reduced the value of the Indian's interest in the restricted lands to a small fraction of their real value. No such measure of valuation is permissible.

The contention of appellants raises the question of what is the interest and estate of an Indian allottee under a trust patent. Such interest and estate is suggested in marginal note 5 found in the opinion of this Court in

Arenas v. Preston, 181 F. 2d 62, at pages 64 and 65, epitomized below:

“The restraint on alienation must not be exaggerated. It does not of itself debase the right below a fee simple * * * The land is not the land of the United States, and timber when cut did not become the property of the United States.” (*United States v. Paine Lumber Co.*, 206 U. S. 467, 473, 27 S. Ct. 697, 699.)

“The virtual fee is in the allottee, with certain restrictions on the right of alienation.” (*United States v. Minnesota*, 113 F. 2d 770, 773; *United States v. Oklahoma G & E Co.*, 127 F. 2d 349.)

“Through an allotment, the Indian allottee acquired an equitable title to the land. While the Government retains the legal title in trust for the Indian, the title of the Indian, except for the limitation against alienation, is, in reality, a title in fee simple.” (*Eastman v. United States*, 28 Fed. Supp. 807, 808.)

In Cohen's Handbook of Federal Indian Law, pages 320-322, the author discusses restraints on alienation from a tribal standpoint, and the value of Indian lands in view of such restraints. The discussion is of equal pertinence in respect to the value of the allotted lands subject to restrictions of the kind here involved. It is said in the text, *id.* page 321:

“If ‘Indian title’ is something less than a fee simple, then in cases of involuntary alienation damages should be based upon something less than the value of the

land itself. *Yet the courts hold that in such cases the value of the land is the measure of damages.*" (Emphasis added.) Citing:

United States v. Shoshone Tribe, 304 U. S. 111, 116, 58 S. Ct. 794, 797;

Leavenworth, L & G R. R. v. United States, 92 U. S. 733, 742, 23 L. Ed. 634;

Beecher v. Weatherby, 95 U. S. 517, 525, 24 L. Ed. 440.

United States v. Shoshone Tribe of Indians, 304 U. S. 111, 58 S. Ct. 794, is in point. The Tribe sued the United States to recover the value of certain reservation lands taken by the United States without the consent of the Tribe for use by a band of Arapahoe Indians. The United States contended that the Shoshones' right of use and occupancy did not include the ownership of timber and minerals, and asked that the judgment be reversed with "directions to determine the value of the Indians' right of use and occupancy but to exclude therefrom 'the net value of the lands' and 'the net value of any timber or minerals.' " In substance the same contention was made there, as here. The Court said, 58 S. Ct. pp. 797-798:

"* * * the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself. (Citing cases.) For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which has only the naked fee, would transfer no beneficial interest. (Citing cases.) *The right of perpetual and exclusive occupancy of the land is not less valuable than the full title in fee.* (Citing cases.)"

The rule of value stated in the foregoing cases is equally applicable to the lands of a minor, or incompetent Indian under guardianship. The estate in land of a minor or incompetent Indian under guardianship is no less than an unconditional fee simple. The Indian's inability to convey would not debase the fee value. This is plainly indicated in *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565. In that case the State of Oklahoma undertook to tax the lands of about 8000 Indians, members of the Chotaw and Chickasaw Tribes, notwithstanding a treaty provision between the United States and said Tribes that such lands should not be taxable during the lives of the individual original allottees. After stating that, "while Congress had power to make treaties, it could not affect titles already granted by the treaty itself," the Court said (32 S. Ct. 570-571):

"Nothing that was said in *Tiger v. Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that 'Tiger was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation,' it was said

that 'incompetent persons, though citizens, may not have the full right to control their property,' and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment."

It thus appears that the value of an Indian's interest in allotted lands is the full value of the fee. The United States has no beneficial interest therein; it is a trustee holding naked legal title only, no more. Its interest in such lands is exactly zero so far as money value is concerned. ALL of the money value is vested in the allottee, and this is true whether he is a minor or an incompetent under guardianship.

The trial court found the money value of Eleuteria's allotment to be \$166,000.00. Appellees' witness Beckley testified that the fee value thereof was \$300,000.00, and their witness Gallagher testified the fee value thereof was \$486,000.00. The finding of value of \$166,000.00 is about one-half of Beckley's valuation, and about one-third of Gallagher's valuation. The finding is amply supported by the evidence, and the trial court committed no error.

Furthermore, the value of the allotted lands was only one of the elements to be considered in fixing the money value of appellees' services. Appellants overlook this pertinent fact of this Court's former decision.

III.

The District Court Did Not Err in Finding the Money Value of Appellees' Legal Services at \$25,750.00.

The trial court found that the value of the legal services rendered by appellees for and on behalf of Eleuteria Brown Arenas, in securing a trust patent for the lands selected by her for allotment in severalty, is the sum of \$25,750.00. The chief criticism of that amount by appellants is that the total amount awarded includes an item of \$5,000.00 for "services rendered by petitioners in the Lee Arenas case for the benefit of" Eleuteria Brown Arenas.

The trial court found in this connection [R. p. 50]:

"The value of the services rendered by petitioners in the Lee Arenas case for the benefit of respondent-plaintiff was \$5,000, and the value of the petitioners' services rendered in the present case was \$20,750.00."

The total amount awarded was fair and reasonable, considering the importance of the case, the amount involved, and the skill and labor required of appellees.

The services performed, the work done, and the time expended by appellees for the benefit of Eleuteria Brown Arenas are set forth in detail in the petition for supplemental decree for allowance of attorneys' fees and expenses of suit, and in the testimony of appellees. [See R. pp. 7-11, and pp. 186-207, 265-266, 203-210 in appeal No. 12218 in this Court.] No helpful purpose could be served by repeating the admitted allegations and said testimony. It is sufficient to say that the services rendered constitute an ample factual basis for the allowance of fees totaling \$25,750.00.

In addition, L. R. Martineau, Jr., testified as an expert on the value of appellees' services [R. pp. 69-157] as follows: If the allotted lands are valued at \$300,000.00, the fee should be \$75,000.00; if the lands are valued at \$200,000.00, the fee should be \$55,000.00; and if valued at \$100,000.00, the fee should be \$30,000.00.

Appellants offered no testimony as to the value of appellees' legal services.

The trial court found the reasonable value of the lands in question to be \$166,000.00. A fee of \$25,750.00 is reasonable under the rules governing the allowance of fees in California, now noted.

In *Berry v. Chaplin*, 74 Cal. App. 2d 669, 679, the Court stated the various elements to be considered in fixing an attorney's fee on a *quantum meruit* basis as follows:

"Among the factors to be considered in determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding are the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded (*City of Los Angeles v. Los Angeles-Inyo Farms Co.*, 134 Cal. App. 268, 276 (25 P. 2d 224)); the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. (*Palm Springs etc. Co. v. Kieberk Corp.*, 46 Cal. App. 2d 234, 241 (115 P. 2d 548); *Collins v. Welsh*, 2 Cal. App. 2d 103, 110 (37 P. 2d 505).)"

In *Sampsell v. Monell*, 162 F. 2d 4, opinion by Judge Stephens, this Court stated the elements to be considered in determining the amount of an attorney's fee as follows (*id.* p. 6):

“As stated by the referee, attorney's services cannot be measured with any degree of mathematical certainty. Here we are left only with a measure termed ‘reasonable.’ The elements in determining a proper fee for an attorney have been summed up in an opinion by Judge Woolsey *in re Osofsky*, D. C., 50 F. 2d 925, 927:

“(1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.

“‘Each case, of course, differs to some extent from every other case in respect of the importance of these several elements.’”

Other authorities to the same effect are: *Palm Springs etc. Co. v. Kieberk Corp.*, 46 Cal. App. 2d 234, 241; *Collins v. Welsh*, 2 Cal. App. 2d 103, 110; *Matthieson v. Smith*, 16 Cal. App. 2d 479, 483; *Los Angeles v. Los Angeles-Inyo Farms Co.*, 134 Cal. App. 268, 276; 3 Cal. Jur. 608, and many more.

The record shows that several years before suit for trust patent was filed on behalf of Eleuteria Brown Arenas she had conferences with appellees Clark and Sallee in respect to employing them to represent her in such suit; that a written contract of employment was then prepared but not executed; that in 1944 she agreed to the employment of appellees including appellee Preston, and that a written contract on a *quantum meruit* basis was then executed by her; that she agreed to pay for any and all services beneficial to her rendered by appellees in the *Lee Arenas* case. [R. pp. 127-128, former appeal No. 12218, and Exhibit 2 therein.] In this connection Oliver O. Clark testified, on cross-examination by Mr. Brett (*id.*):

“Q. Was any writing ever executed by Della Arenas in which there was mention made of her paying either in money or as a part of her allotment for the services to be rendered by you and your associates, including Judge Preston, in the *Lee Arenas* case? A. Yes, the contract, which is in evidence here, expressly covers all litigation and all matters in and out of court having to do with her obtaining an allotment. It was not limited to a contract with her to the determination of her eligibility.

Q. You are referring now to Exhibit 2? A. Right.”

Eleuteria benefited directly from the *Lee Arenas* litigation, in which the right of every member of the Agua Caliente Band to an allotment in severalty and a trust patent thereto was established. She agreed to pay for any and all legal services beneficial to her rendered by appellees. She is directly liable on the *quantum meruit*

contract. The sum of \$5,000.00 for services beneficial to her, prior to the suit filed in her behalf, for which she expressly agreed to pay, is fair and reasonable. The trial court did not err in including that sum in the total amount awarded appellees for their services in her behalf.

Finally, and without conceding any error in the inclusion of said sum of \$5,000.00 in the amount awarded appellees, it should be noted that, even if it was error, this Court could reduce the judgment by the amount of \$5,000.00 and no reversal of the judgment would be necessary.

Conclusion.

For the reasons hereinabove stated, the judgment should be affirmed.

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,

Attorneys for Appellees.

No. 12964
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

C-O-TWO FIRE EQUIPMENT Co. and MAYNARD A.
LASWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPENDIX TO BRIEF FOR THE UNITED
STATES.

VOLUME II.

WILLIAM C. DIXON,
Special Assistant to the Attorney General;

JAMES M. McGRATH,
Special Attorney;

ERNEST A. TOLIN,
United States Attorney,

1602 U. S. Courthouse & Postoffice,
Los Angeles 12, California,

Attorneys for Appellee

FILED

H. G. MORISON,
Assistant Attorney General;

J. ROGER WOLLENBERG,
Special Assistant to the Attorney General.

OCT 18 1951

PAUL P. O'BRIEN
CLERK

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Appendix A.

A—Typical price lists selected from Government Exhibit 1, Part 34, which consists of a number of price lists issued by defendants during the period from September 19, 1932 to May 10, 1949.

Walter Kidde & Company, Inc.

675 Main Street Belleville 9, N. J.

CUSTOMER PRICE SCHEDULE

KIDDE CARBON DIOXIDE PORTABLE EXTINGUISHERS

Effective: June 1, 1946

HAND TYPE

Model	Size	1-24	25-99	100-499	500 & Over
2	2 lb.	\$ 18.00	\$ 17.50	\$ 16.50	\$ 16.00
4	4 lb.	25.00	24.50	23.50	23.00
10	10 lb.	42.00	41.00	39.00	38.00
15	15 lb.	48.00	47.00	45.00	44.00
20	20 lb.	54.00	53.00	51.00	49.00

WHEELED TYPE

50	50 lb.	\$162.00	\$158.00	\$151.00	\$144.00
75	75 lb.	198.00	194.00	187.00	180.00
100	100 lb.	318.00	312.00	300.00	288.00

Standard wheels are standard equipment on all wheeled extinguishers. Rubber tires, if desired,

hook, for mounting, is furnished gratis with Models 4 to 20 inclusive. A spring clip bracket is furnished with the Model 2.

.....

Quantity Orders

On all quantity orders the total number of carbon dioxide hand and wheeled extinguishers only, of assorted sizes and types, ordered at one time determines the unit price of each extinguisher.

.....

Brackets for Hand Portables

Running Board Bracket — Model 4T	— \$4.75
Running Board Bracket — Models 10, 15 & 20	— 5.75
Marine Type Bracket — Models 4 to 20 inc.	— 1.80
Spring Clip Bracket — Model 2	— .70
Wall Hook (spare) — Models 2 to 20 inc.	— .25

.....

Prices are F.O.B. Destination, within Continental U.S.A. (Alaska not included) via rail, motor or water, or FAS any U.S. Port. Prices listed cover domestic packing only.

Net 30 days. No cash discounts.

.....

Prices are subject to change without notice.

ALL ORDERS SUBJECT TO ACCEPTANCE AND ACKNOWLEDGEMENT AT OUR MAIN OFFICE AT 675 MAIN STREET, BELLEVILLE 9, NEW JERSEY

C-O-TWO FIRE EQUIPMENT COMPANY

NET DELIVERED CONSUMER PRICES

HAND AND WHEELED TYPE PORTABLE EXTINGUISHERS

The total number of one or assorted sizes and types of hand and wheeled extinguishers ordered and the time determines the unit price of each extinguisher.

Size	Type	Whh	1-24	25-99	100-499	500 & Over
2 lb.	PS-2 Hand Portable	Swivel	\$18.00	\$17.50	\$16.50	\$16.00
4 lb.	PS-4 Hand Portable	Swivel	25.00	24.50	23.50	23.00
10 lb.	PSH-10 Hand Portable	3 ft. hose	42.00	41.00	39.00	38.00
15 lb.	PSH-15 Hand Portable	3 ft. hose	48.00	47.00	45.00	44.00
20 lb.	PSH-20 Hand Portable	3 ft. hose	54.00	53.00	51.00	49.00
30 lb.	WB or WVF Wheeled Portable	15 ft. hose	162.00	158.00	151.00	144.00
50 lb.	WB or WVF Wheeled Portable	25 ft. hose	198.00	194.00	187.00	180.00
75 lb.	WB or WVF Wheeled Portable	40 ft. hose	318.00	312.00	300.00	288.00

Price includes a wire bracket for 2 lb. size portable with round bottom cylinder. One wall hook is furnished with all other hand portables.

WB is a seat type valve with hand wheel to control discharge of gas at cylinder.

WVF is a pressure-seat type valve which cannot be closed during discharge.

Wide faced steel wheels are furnished with all wheeled type extinguishers.

Add \$20.00 to price of 50 and 75 lb. wheeled portables for solid rubber tires.

Add \$25.00 to prices of 100 lb. wheeled portables for solid rubber tires.

Add \$25.00 to prices of 50 and 75 lb. units for metal protection cover over hose and horn.

Add \$30.00 to price of 100 lb. unit for metal protection cover over hose and horn.

When ordering 100 lb. wheeled units specify if single-cylinder or unit with two 50 cylinders is desired.

CONVERSION TO SQUEEZ-GRIP VALVES AND QUANTITY ORDERS

See Price Sheet R-2 for Changing Handwheel and Other Type Valves to Squeeze-Grip Type.

See Annual Contract Price Sheet P-3 for Quantity Purchases.

BRACKETS FOR HAND PORTABLES

Size	Type	Price Each
b. to 20 lb.	PWH-2 to 20 Wall Hook	\$.25
b.	PWB-2 Wire Bracket	.70
b. to 20 lb.	PB-4 to 20 Marine Bracket	1.80
b.	PRB-4 Running Board Bracket	4.75
b. to 20 lb.	PRB-10 to 20 Running Board Bracket	5.75

ALL ORDERS ARE DELIVERED VIA FREIGHT IN THE U. S. A. OR F. A. S. VESSEL NEAREST PORT FOR
ALASKA, HAWAII OR EXPORT SHIPMENT

TERMS: THIRTY DAYS NET — NO CASH DISCOUNT

THIS PRICE SHEET SUPERSEDES PRICE SHEET P-1 DATED 1/15/46

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

AMERICAN-LA FRANCE-FOAMITE CORPORATION

ELMIRA, N. Y., U. S. A.

Price Schedule - 141-X

FOAMITE CARBON DIOXIDE EXTINGUISHERS

Effective June 15, 1946

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

HAND PORTABLE UNITS

(Including wall hook hanger)

Type	Size	Hose	Quantity Prices			
			1-24	25-99	100-499	500 or Over
"edex" Model 2	2	lb. Swivel horn	\$ 18.00	\$ 17.50	\$ 16.50	\$ 16.00
"edex" Model 3%	3%	lb. Swivel horn	24.00	23.50	22.50	22.00
"edex" Model 10	10	lb. 36	42.00	41.00	39.00	38.00
"edex" Model 15	15	lb. 36	48.00	47.00	45.00	44.00
"edex" Model 20	20	lb. 36	54.00	53.00	51.00	49.00
Bracket (Spring Clip Type) Sizes 10# to 20# incl.—price each \$1.80.						
Hanging Board Brackets (Clamp Type) Size 10 to 20# incl.—price each \$5.75.						

WHEELED PORTABLE UNITS

Type	Size	Hose	Quantity Prices			
			1-24	25-99	100-499	500 or Over
Model 50S or 50D	50 lb.	15 ft.	\$ 162.00	\$ 158.00	\$ 151.00	\$ 144.00
Model 75S or 75D	75 lb.	25 ft.	198.00	194.00	187.00	180.00
Model 100S or 100D	100 lb.	40 ft.	318.00	312.00	300.00	288.00

Spoke wheels are standard equipment on all wheeled portable units.

The letter "D" after model designation indicates seat type or disc type valves are available.

Quantity Orders—The total number of hand and wheeled extinguishers of one or assorted sizes and types that are ordered at one time determines the unit price of each extinguisher.

Extinguishers are Delivered in Continental U. S. A. (Except Alaska) Via Rail, Motor or Water Freight, or FAS any U. S. Port. Prices listed cover domestic packing only.

Terms: Thirty Days Net — No Cash Discounts

AMERICAN ALUMINUM CORPORATION

MADE IN U. S. A.

TYPE DESIGN - 100-2

WHITE CARBON DIOXIDE EXTINGUISHER

(Model 100-2)

TYPE REPORT FOR CLASSIFICATION

CLASSIFICATION

TYPE REPORT

CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2

CLASSIFICATION

CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2

CLASSIFICATION

CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2

CLASSIFICATION

CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT	CLASSIFICATION	TYPE REPORT
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2
100-2	100-2	100-2	100-2	100-2	100-2

CLASSIFICATION

SAN FRANCISCO

LOS ANGELES 21, CALIF.

SEATTLE, WASH.

NET DELIVERED CONSUMER PRICES C-D SNO FOG FIRE EXTINGUISHERS

HAND TYPE PORTABLES

Model	Type	Underwriter Classification	Size	Hose	1 to 24	25 to 99	100 to 499	500 & Over
2-AKS	Lever Seat	B2, C2	2 lb.	Swivel	18.00	17 50	16.50	16.00
4-AKS	Lever Seat	B2, C2	4 lb.	Swivel	25.00	24.50	23.50	23.00
10-A	Wheel Seat	B2, C1	10 lb.	3 ft.	42.00	41.00	39.00	38.00
10-AK	Lever Seat	B2, C1	10 lb.	3 ft.	42.00	41.00	39.00	38.00
15-A	Wheel Seat	B1, C1	15 lb.	3 ft.	48.00	47.00	45.00	44.00
15-AK	Lever Seat	B1, C1	15 lb.	3 ft.	48.00	47.00	45.00	44.00
20-A	Wheel Seat	B1, C1	20 lb.	3 ft.	54.00	53.00	51.00	49.00
20-AK	Lever Seat	B1, C1	20 lb.	3 ft.	54.00	53.00	51.00	49.00
50-A	Wheel Type	B1, C1	50 lb.	15 ft.	162.00	158.00	151.00	144.00
75-A	Wheel Type	B1, C1	75 lb.	25 ft.	198.00	194.00	187.00	180.00
100-A	Wheel Type	B-C	100 lb.	40 ft.	318.00	312.00	300.00	288.00

QUANTITY ORDERS

The total number of hand and wheeled extinguishers only of one or assorted sizes and types that are ordered at one time determines the unit price of each extinguisher.

Wide faced steel wheels are furnished with all wheeled type extinguishers.

BRACKETS FOR PORTABLES

One wall hook furnished with each hand type portable.

Type	Description	Size	Price Each
2-AKS to 20-A & AK	Wall Hook for hand type	2 to 20 lb.	.25
4-AKS to 20-A & AK	Marine Bracket for hand type	4 to 20 lb.	1.80
4-AKS	Running Board Bracket for hand type	4 lb.	4.75
10-AK to 20-A & AK	Running Board Bracket for hand type	10 to 20 lb.	5.75

PRICES ARE DELIVERED IN THE CONTINENTAL UNITED STATES EXCEPT ALASKA VIA RAIL, MOTOR OR WATER FREIGHT. TITLE PASSES TO BUYER UPON DELIVERY TO CARRIER BY SELLER.

TERMS: THIRTY DAYS NET—NO CASH DISCOUNT.

PRICES SUBJECT TO CHANGE WITHOUT NOTICE.

DELIVERIES BASED ON AVAILABILITY OF MATERIAL AND PRODUCTION.

1. The first part of the paper is devoted to a general introduction of the subject. It is divided into two sections: (a) the general principles of the theory, and (b) the special cases. In the first section, the author discusses the general principles of the theory, and in the second section, he discusses the special cases.

2. The second part of the paper is devoted to a detailed discussion of the general principles of the theory. It is divided into two sections: (a) the general principles of the theory, and (b) the special cases. In the first section, the author discusses the general principles of the theory, and in the second section, he discusses the special cases.

3. The third part of the paper is devoted to a detailed discussion of the special cases. It is divided into two sections: (a) the general principles of the theory, and (b) the special cases. In the first section, the author discusses the general principles of the theory, and in the second section, he discusses the special cases.

General Principles of the Theory		Special Cases	
Case	Principle	Case	Principle
1	...	1	...
2	...	2	...
3	...	3	...
4	...	4	...
5	...	5	...
6	...	6	...
7	...	7	...
8	...	8	...
9	...	9	...
10	...	10	...
11	...	11	...
12	...	12	...
13	...	13	...
14	...	14	...
15	...	15	...
16	...	16	...
17	...	17	...
18	...	18	...
19	...	19	...
20	...	20	...

The author concludes the paper by stating that the general principles of the theory are well established, and that the special cases are well understood. He also states that the theory is well suited for practical applications.

C-O-TWO FIRE EQUIPMENT COMPANY

NET DELIVERED CONSUMER PRICES

HAND AND WHEELED TYPE PORTABLE EXTINGUISHERS

total number of one or assorted sizes and types of hand and wheeled extinguishers ordered at time determines the unit price of each extinguisher.

<u>Size</u>	<u>Type</u>	<u>Width</u>	<u>1-24</u>	<u>25-99</u>	<u>100-499</u>	<u>500 & Over</u>
1/2 lb.	PS-2 1/2 Hand Portable	Swivel	\$ 22.00	\$ 21.50	\$ 20.50	\$ 19.75
1 lb.	PS-5 Hand Portable	Swivel	29.00	28.50	27.50	26.50
1 lb.	PSH-10 Hand Portable	3 ft. hose	48.00	47.00	45.00	44.00
1 lb.	PSH-15 Hand Portable	3 ft. hose	55.00	54.00	52.00	50.50
1 lb.	PSH-20 Hand Portable	3 ft. hose	62.00	61.00	59.00	57.00
1 lb.	WB or WVF Wheeled Portable	15 ft. hose	178.00	174.00	166.00	158.00
1 lb.	WB or WVF Wheeled Portable	25 ft. hose	218.00	213.00	205.00	198.00
1 lb.	WB or WVF Wheeled Portable	40 ft. hose	350.00	343.00	330.00	317.00

One wall hook is furnished with all hand portables.

WB is a seat type valve with hand wheel to control discharge of gas at cylinder.

WVF is a pressure-seat type valve which cannot be closed during discharge.

Wide faced steel wheels are furnished with all wheeled type extinguishers.

Add \$25.00 to prices of 50 and 75 lb. wheeled portables for rubber tires.

Add \$35.00 to prices of 100 lb. wheeled portables for rubber tires.

When ordering 100 lb. wheeled units specify if single-cylinder or unit with two 50 lb. cylinders is desired.

BRACKETS FOR HAND PORTABLES

<u>Size</u>	<u>Type</u>	<u>Price Each</u>
to 20 lb.	PWH-2 to 20 Wall Hook	\$.35
	PWB-2 Bracket	1.00
	PWB-5 Bracket	1.50
to 20 lb.	PB-4 to 20 Marine Bracket	3.00
& 5 lb.	PRB-4 & 5 Running Board Bracket	7.00
to 20 lb.	PRB-10 to 20 Running Board Bracket	8.75

CONVERSION TO SQUEEZ-GRIP VALVES AND QUANTITY ORDERS

See Price Sheet R-2 for Changing Handwheel and Other Type Valves to Squeeze-Grip Type.

See Annual Contract Price Sheet P-3 for Quantity Purchases.

PRICES ARE DELIVERED IN CONTINENTAL U. S. A. (ALASKA EXCLUDED) VIA RAIL, MOTOR WATER FREIGHT, OR F. A. S. ANY U. S. PORT. PRICES INCLUDE DOMESTIC PACKING ONLY.

TERMS: THIRTY DAYS NET — NO CASH DISCOUNT

THIS PRICE SHEET SUPERSEDES PRICE SHEET P-1 DATED 6/1/47

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

THE GENERAL PACIFIC CORP.

General Offices and Factory—1501 EAST WASHINGTON BLVD., LOS ANGELES 21, CALIF.
 San Francisco Denver Seattle



NET DELIVERED CONSUMER PRICES C-D SNO FOG FIRE EXTINGUISHERS

HAND TYPE PORTABLES

Model	Type	Underwriter Classification	Size	How	1 to 24	25 to 99	-100 to 499	500 & Over
2½-AKS	Lever Seat	B2, C2	2½ lb.	Swivel	22.00	21.50	20.50	19.75
5-AKS	Lever Seat	B2, C2	5 lb.	Swivel	29.00	28.50	27.50	26.50
10-A	Wheel Seat	B2, C1	10 lb.	3 ft.	48.00	47.00	45.00	44.00
10-AK	Lever Seat	B2, C1	10 lb.	3 ft.	48.00	47.00	45.00	44.00
15-A	Wheel Seat	B1, C1	15 lb.	3 ft.	55.00	54.00	52.00	50.50
15-AK	Lever Seat	B1, C1	15 lb.	3 ft.	55.00	54.00	52.00	50.50
20-A	Wheel Seat	B1, C1	20 lb.	3 ft.	62.00	61.00	59.00	57.00
20-AK	Lever Seat	B1, C1	20 lb.	3 ft.	62.00	61.00	59.00	57.00
50-A	Wheel Type	B1, C1	50 lb.	15 ft.	178.00	174.00	166.00	158.00
75-A	Wheel Type	B1, C1	75 lb.	25 ft.	218.00	213.00	205.00	198.00
100-A	Wheel Type	B-C	100 lb.	40 ft.	350.00	343.00	330.00	317.00

QUANTITY ORDERS

The total number of hand and wheeled extinguishers only of one or assorted sizes and types that are ordered at one time determines the unit price of each extinguisher.

Wide faced steel wheels are furnished with all wheeled type extinguishers. Rubber tired wheels available on Models 50-A and 75-A at additional net cost of \$25.00 per set.

BRACKETS FOR PORTABLES

One wall hook furnished with each hand type portable.

Type	Description	Size	Price Each
2½-AKS to 20 & AK	Wall Hook for hand type	2½ to 20 lb.	.35
2-AKS to 20-A & AK	Marine Bracket for hand type	5 to 20 lb.	3.00
5-AKS	Running Board Bracket for hand type	5 lb.	7.00
10-AK to 20-A & AK	Running Board Bracket for hand type	10 to 20 lb.	8.75

MINIMUM BILLING — \$1.50

PRICES ARE DELIVERED IN THE CONTINENTAL UNITED STATES EXCEPT ALASKA VIA RAIL, MOTOR OR WATER FREIGHT. TITLE PASSES TO BUYER UPON DELIVERY TO CARRIER BY SELLER.

TERMS: THIRTY DAYS NET — NO CASH DISCOUNT

All prices subject to change without notice. All orders received subject to any and all government regulations applicable thereto. All prices billed will be those in effect at time of shipment. Deliveries are based upon availability of materials and production. All quotations are made with the understanding that any and all federal, state, or local taxes which may be applicable will be added to the face of the invoice.

Printed in U.S.A.

Form No. 53

Walter Kidde & Company, Inc.

Belleville 9, New Jersey

CUSTOMER PRICE SCHEDULE

KIDDE CARBON DIOXIDE PORTABLE EXTINGUISHERS

Effective: February 16th, 1948

HAND TYPE					
Model	Capacity	1-24	25-99	100-499	500 & Over
2½	2½ lb.	\$ 22.00	\$ 21.50	\$ 20.50	\$ 19.75
5	5 lb.	29.00	28.50	27.50	26.50
10	10 lb.	48.00	47.00	45.00	44.00
15	15 lb.	55.00	54.00	52.00	50.50
20	20 lb.	62.00	61.00	59.00	57.00
25	25 lb.	68.00	67.00	65.00	63.00
WHEELED TYPE					
50	50 lb.	\$178.00	\$174.00	\$166.00	\$158.00
75	75 lb.	218.00	213.00	205.00	198.00
100	100 lb.	350.00	343.00	330.00	317.00

Disc wheels are standard equipment on all wheeled extinguishers. Rubber tires, on Models 50 and 75, if desired, are \$25.00 extra. "Sparkproof" aluminum disc wheels without rubber tires can be had at \$15.00 extra.

Mounting hook, for mounting, is furnished gratis with Models 10, 15, 20 and 25 inclusive. A spring clip bracket is furnished with the Models 2½ and 5.

Quantity Orders

Fixed quantity orders the total number of carbon dioxide hand and wheeled extinguishers only, of one or more assorted sizes and types, ordered at one time determine the unit price of each extinguisher.

Brackets for Hand Portables

"Rollalong" portable cart	— Models 15, 20 & 25	— \$12.50
Running Board Bracket *	— Models 10, 15, 20 & 25	— 8.75
Spring Clip Bracket (spare)	— Models 2½ & 5	— 1.00
Wall Hook (spare)	—	— .35

* Applies to all models except the old Model 20S & 20D. The price of the bracket for this model is \$1.00.

Prices are F. O. B. Destination, within Continental U.S.A. (Alaska not included) via rail, motor or water transport, or FAS any U.S. Port. Prices listed cover domestic packing only.

Payment: Net 30 days. No cash discounts.

Prices are subject to change without notice.

ALL ORDERS SUBJECT TO ACCEPTANCE AND ACKNOWLEDGMENT AT OUR MAIN OFFICE AT 675 MAIN STREET, BELLEVILLE 9, NEW JERSEY

AMERICAN-LAFRANCE-FOAMITE CORPORATION

ELMIRA, N. Y., U. S. A.

Price Schedule - 141-X

FITE CARBON DIOXIDE EXTINGUISHER

Effective March 1, 1948

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

PORTABLE UNITS

(Including wall hook hanger)

Type	Size	Hose	Quantity Prices			
			1-24	25-99	100-499	500 or C
"edex" Model 2½	2½ lb.	Swivel horn	\$ 22.00	\$ 21.50	\$ 20.50	\$ 19.75
"edex" Model 3½	3½ lb.	" "	25.50	25.00	24.00	23.50
"edex" Model 5	5 lb.	" "	29.00	28.50	27.50	26.50
"edex" Model 10	10 lb.	36"	48.00	47.00	45.00	44.00
"edex" Model 15	15 lb.	36"	55.00	54.00	52.00	50.50
"edex" Model 20	20 lb.	36"	62.00	61.00	59.00	57.00

Spring Clip Bracket (Spare)—Sizes 2½# and 5#—price each \$1.00.

Spring Board Bracket—Sizes 10# to 20#—price each \$8.75.

Spring Bracket—Sizes 10# to 20#—price each \$3.00.

Hook Hanger is standard. Spring Clip Bracket for Models 2½ and 5 will be furnished at extra cost.

WHEELED PORTABLE UNITS

Type	Size	Hose	Quantity Prices			
			1-24	25-99	100-499	500 or C
Model 50S or 50D	50 lb.	15 ft.	\$ 178.00	\$ 174.00	\$ 166.00	\$ 158.00
Model 75S or 75D	75 lb.	25 ft.	218.00	213.00	205.00	198.00
Model 100S or 100D	100 lb.	40 ft.	350.00	343.00	330.00	317.00

Rubber tired wheels are standard equipment on all wheeled portable units. Rubber tired wheels on Models 50 and 75, if desired, are \$25.00 extra. Rubber tired wheels on Model 100, if desired, are \$35.00 extra.

"D" after model designation indicates seat type or disc type valves are available.

Quantity Orders

Total number of hand and wheeled extinguishers of one or assorted sizes and types ordered at one time determines the unit price of each extinguisher.

Units are Delivered in Continental U. S. A. (Except Alaska) Via Rail, Motor or Water Freight or FAS any U. S. Port. Prices listed cover domestic packing only.

Terms: Thirty Days Net — No Cash Discounts

Walter Kidde & Company, Inc.
100 Cedar Street
New York

Index No. 2,3,6,7,8,9,10,11,12,15

Date 8/29/32

Subject Lux & Fyre-Free
Extinguishers
(For Aqua-Lux see sheet,
P2-14)

Effective September 19, 1932

1 - Quantity discounts apply when assorted sizes of portables and wheeled tinguishers (exclusive of Model #100) are purchased and in such cases the quantity discounts for portable extinguishers apply.

2 - Quantity discounts apply only to extinguishers covered by a single purchase order; however, delivery may be made over a one year period from date of order. Cancelled or reduced orders will have prices adjusted to discounts applying for quantities actually taken plus a charge of 5% of the price of the cancelled quantity.

3 - If the purchaser's name is on our list of preferential purchasers such purchaser will receive the "50 to 99" prices on all purchases made. Send in name of your large companies and advice will be sent if they are on the list.

Lux & Fyre-Freez	List Price	Column "A"	Purchaser's Price Per Unit				
			1 - 12	13 - 24	25 - 49	50 - 99	100 - 199
			10%	10 & 5	10 & 8	10 & 10	10 & 13
Model #4	30.00	20.66	27.00	25.65	24.84	24.30	23.49
Model #7	45.00	31.00	40.50	38.48	37.26	36.45	35.24
Model #10	50.00	34.45	45.00	42.75	41.40	40.50	39.15
Standard (15)	55.00	37.90	49.50	47.03	45.55	44.55	43.07
Model #20	80.00	55.10	72.00	68.40	66.24	64.80	62.64
			1 - 5	6 - 10	11 - 19	20 & UP	
			10%	10 & 5	10 & 8	10 & 10	
Wheeled							
Model #20	90.00	65.95	81.00	76.95	74.52	72.90	
Model #50	165.00	120.90	148.50	141.08	136.62	133.65	
			List	5%	8%	10%	
Model 100 Wh.							
Truck Lux	390.00	315.00	390.00	370.50	358.80	351.00	

For Hose Reel & Hose Rack equipment write for prices giving number of cylinders and length of hose desired.

Lux and Fyre-Freez Model #50 and Lux Model #100 furnished standard with rubber covered hose.

For price on Fyre-Freez Strap see spare parts list.

Truck Extinguisher Bracket holder for 10# & 15# \$9.25 net to client. Dealer discount
 " " " " 20# 12.50 " " " "
 " " Cup " " 10# & 15# 9.75 " " " "
 Marine Bracket " " " " 4.00 " " " "

For the marine extinguisher the prices are the same as those listed above

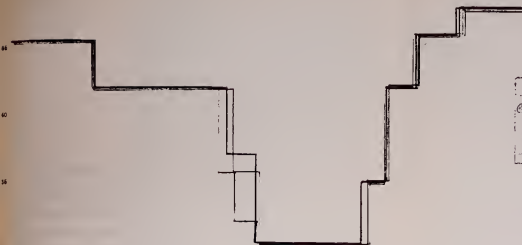
This sheet replaces Prices P2-13, P2-3,
Products E2-17

Page Number P2 - 1

FILE ALL SHEETS IMMEDIATELY UPON RECEIPT.

CONSUMERS PRICES OF PORTABLE CARBON DIOXIDE FIRE EXTINGUISHERS BY PRODUCER, 1938 - 1949

PER POUND MODEL - PRICE PER UNIT IN SMALLEST QUANTITY LOT



No. 2012-5V
 1000
 C.C. Two Ins. Co.
 8
 6-1950
 1000

C-0-Two	Red	_____
Walter Kilde	Blue	_____
American-LaFrance	Green	_____
General Pacific	Brown	_____

Source: Price sheets of the four defendant manufacturers named in Indictment No. CR 20762.

No price sheets made available by C-O-Two prior to 1936. No price sheets made available by General Pacific prior to 1945.

Appendix A-2.

A-2—Pages 7 and 8 of Government Exhibit 7—a compilation prepared from published price lists of all defendants showing the net delivered consumer prices and price changes quoted on the 15# model fire extinguishers during the period 1938 to 1949, inclusive. (These two pages are typical of the balance of this exhibit which shows the published prices and price changes of all defendants on the 2½#, 5#, 10#, 15#, 20#, 50#, 75#, and 100# models for the years 1938 to 1949, inclusive.)

Appendix A-2.

CONSUMERS PRICES OF PORTABLE CARBON DIOXIDE FIRE EXTINGUISHERS, BY PRODUCER, BY QUANTITY,

1938-1949

FIFTEEN POUND MODEL—PRICE PER UNIT

Manufacturer	Effective Date	Issue Print Date	List Price	1 to 24 units	25 to 99 units	100 to 499 units	500 and over	Remarks
The General Pacific Corporation	5-10-49			\$55.00	\$54.00	\$52.00	\$50.50	
C-O-Two Fire Equipment Company	4-1-49	P 3-49		55.00	54.00	52.00	50.50	
Walter Kidde & Company, Inc.	8-12-48	P 9-48		55.00	54.00	52.00	50.50	
American-LaFrance-Foamite Corporation	3-1-48	P 2-48		55.00	54.00	52.00	50.50	"Effective to 12-12-49".
Walter Kidde	2-16-48	P 2-48		55.00	54.00	52.00	50.50	
The General Pacific Corporation	1-15-48			55.00	54.00	52.00	50.50	
C-O-Two	1-1-48			55.00	54.00	52.00	50.50	
C-O-Two	6-1-47	P 5-47		52.50	51.50	49.50	48.00	
Walter Kidde	5-1-47	P 5-47		52.50	51.50	49.50	48.00	
General Pacific	2-15-47			52.50	51.50	49.50	48.00	
American-LaFrance	2-14-47	P 4-47		52.50	51.50	49.50	48.00	
C-O-Two	2-10-47	P 1-47		52.50	51.50	49.50	48.00	
Walter Kidde	1-15-47	P 1-47		52.50	51.50	49.50	48.00	
General Pacific	6-15-46			48.00	47.00	45.00	44.00	
American-LaFrance	6-15-46	P 6-46		48.00	47.00	45.00	44.00	
C-O-Two	6-5-46	P 6-46		48.00	47.00	45.00	44.00	
Walter Kidde	6-1-46	P 5-46		48.00	47.00	45.00	44.00	
				<u>1 to 12</u>	<u>13 to 24</u>		<u>500 to 999</u>	<u>1000 or over</u>
Walter Kidde	2-1-46			39.50	39.00	38.00	37.00	34.35
American-LaFrance	1-15-46	P 1-46		39.50	39.00	38.00	37.00	34.35
C-O-Two	1-15-46	P 1-46		39.50	39.00	38.00	37.00	34.35
General Pacific	1-2-46			39.50	39.00	38.00	37.00	34.35
C-O-Two	10-15-45	P 11-45		39.50	39.00	38.00	37.00	34.35
C-O-Two	4-1-44	P 3-44	34.35	"Price for any quantity" - -				Same prices reprinted 2-45 effective 1-1-45, and again on 4-45 effective 4-1-45.
American-LaFrance	8-27-43		34.35	"Price for any quantity" - -				
Walter Kidde	8-1-43		34.35	"Price for any quantity" - -				Same prices reissued effective 9-29-43 and again, effective 9-20-44 and again, effective 9-1-45.
C-O-Two	7-15-43	P 7-43	34.35	"Price for any quantity" - -				Prices apply only where equipment is for purchaser's own use and not for ultimate delivery to the Government.
Walter Kidde	2-10-43		36.16	"Price for any quantity" - -				
American-LaFrance	1-15-43	P 1-43	36.16	"Price for any quantity" - -				
C-O-Two	12-1-42	P 6-43		43.21	- - - - -	42.33	41-45 40.57	
Walter Kidde	10-5-42			36.16	36.16	36.16	<u>100 to 249</u> <u>250 to 499</u> <u>500 to 749</u> <u>750 to 999</u> 36.16 36.16 36.16 36.16	36.16

Sources: Price sheets of the four defendant manufacturers named in Indictment No. CR 20752.

Except as otherwise noted, terms of sale are (1) Net 30 days. No cash discounts. (2) Seller pays rail, motor or water freight charges to destination within Continental U.S.A. (excluding Alaska).

No price sheets made available by C-O-Two prior to 1938. No price sheets made available by General Pacific prior to 1946.

CONSUMERS PRICES OF PORTABLE CARBON DIOXIDE FIRE EXTINGUISHERS, BY PRODUCER, BY QUANTITY,
1938-1949
FIFTEEN POUND MODEL—PRICE PER UNIT

Manufacturer	Effective Date	Issue or Print Date	List Price	1 to 12 units	13 to 24 units	25 to 49 units	50 to 99 units	100 to 249 units	250 to 499 units	500 to 749 units	750 to 999 units	1000 and over	Remarks
Walter Kidde	8-1-41	P 2-9-42	70.00	49.00	48.02	- - - - -	47.04	46.55	46.06	45.57	45.08	44.10	Same prices reprinted 1-2-42 effective 1-1-42, and again, reissued, effective 6-1-42, and again reissued, effective 8-1-42.
American-LaFrance	8-1-41	P 9-41	70.00	49.00	48.02	- - - - -	47.04	46.55	46.06	45.57	45.08	44.10	Same prices reprinted 12-41 effective 1-1-42 and again on 6-42 effective 6-30-42.
C-O-Two	8-1-41	P 7-41		49.00	48.02	- - - - -	47.04	46.55	46.06	45.57	45.08	44.10	Same prices reprinted 12-41 effective 1-1-42 and again on 8-42 effective 7-1-42.
C-O-Two	4-22-41			49.00	48.02	- - - - -	47.04	46.06	- - - - -	45.08	<u>750 and over</u> 43.75		
American-LaFrance	4-22-41		70.00	49.00	48.02	- - - - -	47.04	46.06	(250) 45.08	- - - - -	- - - - -		Prices for larger quantities on application.
C-O-Two	1-1-40			49.00	48.02	- - - - -	47.04	46.06	- - - - -	45.08	41.75		
Walter Kidde	1-1-40		70.00	49.00	48.02	- - - - -	47.04	46.06	(250 and over) 45.08	- - - - -	- - - - -		Lower prices for larger quantities may be had on application. Same prices reissued effective 5-18-40.
American-LaFrance	1-1-40			49.00	48.02	- - - - -	47.04	46.06	- - - - -	45.08	41.75		
Walter Kidde	9-15-39		72.00	50.40	49.39	48.38	47.37	46.36	45.36				Lower prices for larger quantities may be had on application.
American-LaFrance	9-15-38	P 9-15-38		50.40	49.39	48.38	47.37	46.36	45.36	43.34	39.37		Same prices reprinted 9-15-38 effective 3-1-39.
C-O-Two	9-15-38			50.40	49.39	48.38	47.37	46.36	45.36	43.34	39.37		Same prices reissued effective 9-1-39.
Walter Kidde	11-5-38		72.00	50.40	49.39	48.38	47.37	46.36					Lower prices for larger quantities may be had on application.
Walter Kidde	9-15-38	P 7-11-38 P-9-38	72.00	50.40	49.39	48.38	<u>50 and over</u> 47.37 <u>50 to 99</u> 47.37*	<u>100 to 299</u> 46.36*					Lower prices for larger quantities may be had on application.
C-O-Two	2-1-38			50.40	49.39	48.38	47.37	<u>100 to 249</u> 46.36	45.36	- - - - -	43.34	39.37	
American-LaFrance	2-1-38	P 1-13-38		50.40	49.39	48.38	47.37	46.36	45.36	- - - - -	43.34	39.37	
Walter Kidde	2-1-38	I 12-6-37	72.00	50.40	49.39	48.38	47.37	46.36	45.36				Lower prices for larger quantities may be had on application.

* These categories appeared on the sheet reprinted on 9-38 only.

Sources: Price sheets of the four defendant manufacturers named in Indictment No. CR 20752.

Except as otherwise noted, terms of sale are (1) Net 30 days. No cash discounts. (2) Seller pays rail, motor or water freight charges to destination within Continental U.S.A. (excluding Alaska).

No price sheets made available by C-O-Two prior to 1938. No price sheets made available by General Pacific prior to 1946.

Appendix B.

B—Summary of sizes of defendants' portable carbon dioxide fire extinguishers 1938-1949.

Appendix B.

SUMMARY OF SIZES OF PORTABLE CARBON DIOXIDE FIRE EXTINGUISHERS
MANUFACTURED, BY PRODUCERS, 1938-1949

Size (in pounds)	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949
Two Pound Model	C K A	C K A	C K A	C K A	C K A	K	K	C K	C K A G	C G		
Two and one-half Pound Model									K	C K A G	C K A G	C K A G
Three and five-eighths Pound Model									A	A	A	A
Four Pound Model	C K A	C K A	C K A	C K A	C K A	C K A	C K	C K A	C K A G	G		
Five Pound Model									K	C K A G	C K A G	C K A G
Seven and one-half Pound Model	C K A	C K A	C K A	C K A	K A							
Ten Pound Model	C K A	C K A	C K A	C K A	C K A	C K A	C K	C K A	C K A G	C K A G	C K A G	C K A G
Fifteen Pound Model	C K A	C K A	C K A	C K A	C K A	C K A	C K	C K A	C K A G	C K A G	C K A G	C K A G
Twenty Pound Model	C K A	C K A	C K A	C K A	C K A			C K	C K A G	C K A G	C K A G	C K A G
Twenty-five Pound Model										K	K	K
Thirty-five Pound Model	C	C	C	C								
Forty Pound Model	C	C	C	C								
Fifty Pound Model	C K A	C K A	C K A	C K A	C K A	C K A	C K	C K A	C K A G	C K A G	C K A G	C K A G
Seventy-five Pound Model	C K	C K	C K	C K	C K A	C K A	C K	C K A	C K A G	C K A G	C K A G	C K A G
One Hundred Pound Model	C K A	C K A	C K A	C K A	C K A	C K A	C K	C K A	C K A G	C K A G	C K A G	C K A G
One Hundred and Fifty Pound Model	K	K	K	K								

Sources: Price sheets of the four defendant manufacturers named in Indictment No. CR. 20752.
No price sheets made available by C-O-Two prior to 1938. No price sheets made available
by General Pacific prior to 1946.

C—C-O-Two Fire Equipment Company
K—Walter Kidde & Company, Inc.
A—American-LaFrance-Foamite Corporation
G—The General Pacific Corporation

Appendix C.

C—Government Exhibit 1, Parts 48, 49 and 50.

WESTERN UNION.

Jan. 31, 1946

M. A. Laswell, Pres.

C-O-Two Fire Equipment Co.

Newark, N. J.

Re County of Los Angeles Bid Our Letter January 25.
Wire Immediately Price to Bid.

Superior Fire Equipment Co.

VH

JOHN N. SCHICHTEL

Manager

MIchigan 9578

SUPERIOR FIRE EQUIPMENT COMPANY

Fire Protection Engineers and Contractors

Manufacturers and Distributors of

UNDERWRITERS LABORATORIES APPROVED FIRE

EQUIPMENT

615-617 East Third Street

Los Angeles 13, California

January 25, 1946

C-O-TWO FIRE EQUIPMENT COMPANY

Box 390,

Newark, 1, New Jersey

Attention: Mr. M. A. Laswell,

Vice President

Gentlemen:

We enclose copy of bid to Los Angeles County for
25—2 Pound C-O-Two Extinguishers and wall brackets
and wire brackets.

Under your new schedule of prices Los Angeles County would be entitled to a price which would only allow us .05¢ per extinguisher as profit. We are, therefore, asking that you kindly advise us by return airmail what price we should bid and what our cost is to be.

Awaiting your early reply, we are

Very truly yours,

SUPERIOR FIRE EQUIPMENT Co.,

By: J. N. Schichtel

J. N. Schichtel

JNS.W

TWENTY FIVE YEARS EXPERIENCE

WESTERN UNION.

RD4 29 WUX TDNK NEWJER February 1, 1946

Superior Fire Equipment Company

615 East Third Street

Los Angeles 13, Cal.—

Relet 25 Your telegram 30. Quote \$9.60 each including wall hook in this one case only. Wire brackets seventy cents each additional. Your compensation this special price five percent.

C O Two Fire Equipment Company

25 30 \$9.60.

Appendix D.

D—Government Exhibit 3. An abstract of Los Angeles City Department of Water and Power, Bid No. 17-7938 opened May 17, 1948.

Appendix E.

E—Government Exhibit 1, Part 35.

May 26, 1948

C-O-Two Fire Equipment Company
P. O. Box 390
Newark 1, New Jersey

Gentlemen:

We are enclosing our order 1516-C for sixty PSH-20 C-O-Two type 20# Fire Extinguishers. Will you please endeavor to make immediate shipment and advise by return air mail shipping date.

Yours very truly,

WARREN & BAILEY COMPANY

Superintendent

RMB:bl

Appendix F.

F—Government Exhibit 1, Part 36.

May 25, 1948

Mr. E. V. Werk
c/o Pyrene Manufacturing Company
1335 South Figueroa Street
Los Angeles 15, California

Dear Sir:

We are enclosing a copy of our letter of May 20, which was mailed to the City of Los Angeles asking them to withdraw our bid on C-O-Two Fire Extinguishers.

As we explained to you on the telephone, as soon as we were informed that we made an error on this quotation by giving the City a cash discount of 2% 30 days, we immediately phoned the Department of Water & Power and asked permission to withdraw this bid. They suggested we write them a letter, which we are enclosing.

We wish to assure you that we did everything possible to correct this error and want you to know that the cash discount given on this bid was not intentional but was definitely a mistake.

Yours very truly,

WARREN & BAILEY COMPANY
Superintendent

RMB:bl
Enclosure

Appendix G.

G—Government Exhibit 1, Part 37.

May 20, 1948

City of Los Angeles
Department of Water & Power
Mr. W. R. Foster
P. O. Box 3669, Terminal Annex
Los Angeles 54, California

Attention: Mr. David Knaiger

Gentlemen:

Please refer to bid No. 17-7938, which was to be opened on May 17, 1948, covering sixty PSH-20 C-O-Two Fire Extinguishers.

We wish to withdraw this bid as quotation was made in error.

Thank you.

Yours very truly,

WARREN & BAILEY COMPANY

Superintendent

RMB:bl

Appendix H.

H—Government Exhibit 1, Part 39.

WESTERN UNION.

June 4, 1948

C O Two Fire Equipment Co.
P.O. Box 390
Newark, k. New Jersey

Has shipment been made on our order 1516-C. We stated 20 days delivery on this order to our customer. Time is getting short. Please answer by wire Monday June 7th without fail.

Warren & Bailey
Ross M. Bell

oca

Appendix I.

I—Government Exhibit 1, Part 40.

WARREN & BAILEY

COMPANY

Telephone: ANgelus 12151

WABACO

Industrial Supplies

350 South Anderson St.

Los Angeles, Calif.

Zone 33

June 4, 1948.

C-O-Two Fire Equipment Company

P. O. Box 390,

Newark, 1, New Jersey.

Gentlemen:

Has shipment been made on our order #1516-C? We stated 20 days delivery on this order to our customer and time is getting short.

Please wire us Monday June 7th collect, giving us shipping information.

Very truly yours,

WARREN & BAILEY COMPANY

Ross M. Bell

Superintendent.

RMB:rp

All sales are subject to any additions as the result of state and federal taxes which may be enacted. Quotations herein, unless otherwise stated, are for immediate acceptance, and all orders are accepted subject to delay caused by fire, accidents, strikes and conditions beyond our control.

Appendix J.

J—Government Exhibit 1, Part 41.

WESTERN UNION.

June 8th, 1948

C O Two Fire Equipment Co.

P.O. Box 390

Newark, 1, New Jersey

Have had no acknowledgement or answer to our letters of May 26th and June 4th regarding our order 1516-C. Wire collect today sure, shipping date of this order.

Warren & Bailey Co.

Ross M. Bell

oca

Appendix K.

K—Government Exhibit 1, Part 42.

WESTERN UNION.

NB5 36 PD-WUX TDN NEWARK NJER 10 25 5P

Duplicate of Telephoned Telegram
1948 Jun. 10, PM 12:03

Warren & Bailey Co.

350 South Anderson Ave LosA

Retel 8th. Our M. A. Laswell will be in Los Angeles tomorrow and will contact you re your order.

C. D. Schmolze C O Two Fire Equipment Co.

Appendix L.

L—Government Exhibit 1, Part 51.

August 23, 1948

Purchasing Agent
Los Angeles County
1660 Eastlake Avenue
Los Angeles, California

Gentlemen: Attention Mr. Sprohs

Please refer to Vendor's Quotation made to the County of Los Angeles, Quotation #2958, dated August 12, 1948 and filed August 20, 1948.

Kindly be advised that due to the fact that the material is unobtainable by us at this time, we herewith beg to withdraw all quotations.

Trusting that we may have the opportunity in submitting bids at some future date, we beg to remain,

Very truly yours,

F. S. & W. W. HIRSCH

wwh:loc

Appendix M.

M—Portions of Government Exhibit 1, Part 1, a patent licensing agreement between defendant Walter Kidde & Company, Inc., and appellant C-O-Two, dated August 24, 1932, relating to price regulations and to the duration of the agreement.

LICENSE AGREEMENT made this 24th day of August, 1932, between WALTER KIDDE COMPANY, INC., a New York corporation, herein called "Licensor" and C-O-Two FIRE EQUIPMENT COMPANY, a California corporation, herein called "Licensee."

WHEREAS Licensor is the sole owner of the following patents and of all rights thereunder, except as hereinafter set forth, and Licensee desires a license under said patents, viz.:

United States Rustige patent 1,335,394, issued Mar. 30, 1920

United States Minor patent 1,760,274, issued May 27, 1930

Canadian Rustige patent 190,314, issued May 13, 1919

Canadian Hiss patent 266,726, issued Dec. 14, 1926

Canadian Minor patent 310,417, issued Apr. 14, 1931.

NOW THEREFORE in consideration One Dollar (\$1.00) and of the mutual agreements herein set forth, the parties hereto have agreed as follows:

1. Upon the terms and conditions hereinafter set forth, Licensor hereby grants to Licensee a license, which shall

be exclusive except as to Licensor and except as otherwise provided in Article 9 hereof, in and for the United States of America, its territories and dependencies, to make, sell and use the inventions set forth in said United States Rustige and Minor patents and in and for the Dominion of Canada, to make, sell and use the invention set forth in said Canadian Rustige, Hiss and Minor patents, except that no license is hereby granted under Claims 2, 4, 5 and 6 of said Canadian Hiss patent.

* * * * *

7. This license is granted solely upon the condition that Licensee, its agents, representatives, controlled and subsidiary companies and selling sub-licensees shall not during the remainder of the respective terms of said patents directly or indirectly sell or otherwise dispose of any CO₂ fire extinguishing apparatus, or Schedule-listed parts intended for use therein, embodying features covered by said patents or either of them at prices less than, or upon terms contrary to those followed by Licensor and set forth in the Schedule of Minimum Prices and Terms attached hereto and forming part of this agreement, or in any new or amended schedule that may later be established in place thereof; and that no adjunctive apparatus or parts, such as are set forth in the Schedules attached hereto, shall be given or sold or in any way disposed of by Licensee as a gratuity, bonus or rebate; and that no gratuity, bonus or rebate of any sort shall be in any other way directly or indirectly offered or given; nor shall anything be done in any other way for the purpose of indirectly accomplishing

a sale to the customer of apparatus covered hereby at prices less than those set forth in the Schedule of Minimum Prices and Terms made part hereof; nor shall either party hereto lease or rent or in any other manner temporarily place with a customer or user, apparatus covered hereby in such manner as to directly or indirectly amount to a disposition of such apparatus on terms less than those set forth in said Schedule of Minimum Prices and Terms.

Where Licensee quotes to a customer on apparatus involving devices covered by any of the Schedules of Minimum Prices and Terms set forth herein (whether such device or apparatus be subject to royalty or not) and at the same time quotes such customer upon apparatus or devices not included in any of the Schedules of Minimum Prices and Terms attached hereto or pertaining to carbon dioxide systems, Licensee will make such quotations separately and in rendering bills for such apparatus or devices will make separate charges for such classes of apparatus or devices.

8. The terms and conditions of this agreement as to its attached Schedules of Minimum prices and Terms and any amended or future Schedules of Minimum Prices and Terms, concerning the sale by Licensee of apparatus embodying the inventions of said patents in the United States and in Canada shall be binding upon and be observed by Licensor, its controlled and subsidiary companies, agents and representatives and by all concerns holding license or other rights granted prior to June 15, 1932 under said patents.

Neither Licensor nor Licensee will dispose of apparatus covered by this license otherwise than directly to licensees or sub-licensees for selling only or to the ultimate consumer or to the classes of customers mentioned in the attached Schedule.

* * * * *

20. Unless sooner terminated as herein provided, the term of this agreement shall run to the expiry dates in the United States and Canada, respectively, of said United States Minor patent and Canadian Hiss and Minor patents.

Provided, however, that if in the United States said Minor, or if in Canada either said Hiss or said Minor patent, shall be judicially declared invalid or so limited as not to apply to Licensee's apparatus, the royalty rate shall be reduced to one (1%) per cent and such royalty shall then be payable only as long as the Rustige patent remains in force or is effective in the United States or in Canada, respectively.

* * * * *

Appendix N.

N—Portions of Government Exhibit 1, Part 12, a patent licensing agreement between Walter Kidde & Company, Inc., and American-LaFrance-Foamite Corporation, dated August 25, 1932, relating to price regulations and to the duration of the agreement.

LICENSE AGREEMENT made this 25th day of August, 1932, between WALTER KIDDE COMPANY, INC., a New York corporation, herein called "Licensor" and AMERICAN LA FRANCE & FOAMITE CORPORATION, a New York corporation, herein called "Licensee."

WHEREAS Licensor is the sole owner of the following patents and of all rights thereunder, except as hereinafter set forth, and Licensee desires a license under said patent, viz.:

United States Rustige patent 1,335,394, issued Mar. 30, 1920

United States Minor patent 1,760,274, issued May 27, 1930

Canadian Rustige patent 190,314, issued May 13, 1919

Canadian Hiss patent 266,726, issued Dec. 14, 1926

Canadian Minor patent 310,417, issued Apr. 14, 1931.

NOW THEREFORE in consideration of One Dollar (\$1.00) and of the mutual agreements herein set forth, the parties hereto have agreed as follows:

The balance of Appendix N is the same as Appendix M.

Appendix O.

O—Portions of Government Exhibit 1, Part 24, and Government Exhibit 1, Part 25, patent licensing agreements between Specialties Development Corporation, a subsidiary of Walter Kidde & Company, Inc., licensor, and The General Detroit Corporation and The General Pacific Corporation, licensee, dated December 1, 1944 and December 30, 1944, respectively, which relate to price regulations and to the duration of the agreements.

AGREEMENT.

This agreement made and entered into this 1st day of December, 1944, by and between SPECIALTIES DEVELOPMENT CORPORATION, a New Jersey corporation, having its office and principal place of business at 60 West Street, Bloomfield, New Jersey, hereinafter referred to as "Licensor," which expression shall include its successors and assigns where the context so requires or admits, and THE GENERAL DETROIT CORPORATION, a Michigan corporation, having its office and principal place of business at 2272 East Jefferson Avenue, Detroit 7, Michigan, hereinafter referred to as "Licensee," which expression shall include its agents, successors, assigns and controlled or subsidiary corporations where the context so requires or admits;

WHEREAS, Licensor is the sole owner of the following patents, viz.:

United States Patent No. 1,760,274 (Minor) issued May 27, 1930

Canadian Patent No. 266,726 (Hiss) issued Dec. 14, 1926

Canadian Patent No. 310,417 (Minor) issued Apr. 14, 1931.

NOW, THEREFORE, in consideration of One Dollar (\$1.00) and of the mutual agreements herein set forth, the parties hereto have agreed as follows:

(1) Upon the terms and conditions hereinafter set forth, Licensors hereby grants to Licensee a non-exclusive license, in and for the United States of America, its territories and dependencies under said United States patent, and in and for the Dominion of Canada under said Canadian patents, to make, sell and use the inventions set forth in the respective patents, in connection with the manufacture of carbon dioxide fire extinguishing apparatus, and for no other purpose, except that no license is hereby granted under claims 2, 4, 5 and 6 of said Canadian Patent No. 266,726 (Hiss).

* * * * *

(7) Licensee agrees that Licensors has the right (unless, before such right is exercised, it shall have been determined by the Supreme Court of the United States, by overruling the case of *United States v. General Electric Company*, 272 U. S. 476, or otherwise, that it shall be illegal to do so) to require after sixty (60) days' written notice to Licensee that Licensee shall not directly or indirectly sell or otherwise dispose of any apparatus embodying features covered by said patents at prices less than, or upon terms contrary to those which Licensors will set forth in a Schedule of Minimum Prices and Terms to accompany said notice.

In the event such a Schedule of Minimum Prices and Terms is established, Licensee agrees that such Schedule of Minimum Prices and Terms shall be binding upon and be

observed by Licensee, and its controlled and subsidiary companies, agents and representatives.

(8) Licensor and Licensee agree that in the event Licensor exercises its right herein to establish a Schedule of Minimum Prices and Terms, then and then only shall the following terms and conditions of this Article be binding on the respective parties hereto:

a. Licensee agrees that when it quotes to a customer on apparatus involving devices covered by any such Schedule of Minimum Prices and Terms and at the same time quotes such customer upon apparatus or devices not included in any such Schedule of Minimum Prices and Terms, Licensee will make such quotations separately, and will not directly or indirectly make a contract to sell or a sale of licensed apparatus contingent upon a contract to sell or a sale of unlicensed apparatus, devices or parts, and in rendering bills for such apparatus or devices will make separate charges for such classes of apparatus or devices.

b. Licensee agrees that Licensor may, from time to time, upon sixty (60) days written notice to Licensee, establish an amended or new Schedule of Minimum Prices and Terms and/or add new items thereto; and Licensee agrees that such new and amended prices shall not be released to customers prior to thirty (30) days before such prices become effective. In all cases where notice of amendment is given there shall be delivered with and as a part of such notification a copy of the amended or new Schedule of Minimum Prices and Terms and the statement of the date when it shall become effective, and upon such date, such amended or new Schedule of Minimum Prices and Terms shall be binding upon Licensee.

c. Licensor agrees that in case Licensor gives to Licensee any such notice as is provided for in paragraph (b) of this Article, similar notices in identical terms shall simultaneously be given by Licensor to any and all other licensees holding licenses to manufacture and sell, who shall be bound thereby in the same manner and to the same extent as Licensee.

d. Licensee agrees that in the event Licensee violates this agreement as to minimum prices, terms and conditions of sale to consumer or user or other disposition of apparatus embodying the invention of said patents, Licensee shall within forty-five (45) days after notice has been given to it by Licensor, pay to Licensor as liquidated damages and not as penalty an amount equal to sixty-five percent (65%) of the price of the apparatus so sold, or otherwise disposed of, computed on the prices set forth in such Schedule of Minimum Prices and Terms.

e. Licensor agrees that it will not grant, or continue in force, any license under the said patents in which minimum prices are lower or the terms and conditions including royalty are more favorable therein than in the Schedule of Minimum Prices and Terms or amendment thereof which shall be established for Licensee.

f. Licensor may, at any time, on thirty (30) days' written notice to Licensee, cancel and terminate or suspend, in the United States, its territories and dependencies, or in Canada, or in both said countries, and as to any or all of said patents, the minimum price restrictions set forth in such Schedule of Minimum Prices and Terms

as respects apparatus coming thereunder. In such event, however, Licensor shall then be relieved of its obligation herein to commence or maintain at least one infringement suit under such patent or patents as to which such Schedule of Minimum Prices and Terms has been cancelled or terminated by Licensor.

g. Licensee agrees that it will not during the remainder of the respective terms of said patents, directly or indirectly sell or otherwise dispose of any carbon dioxide fire extinguishing apparatus embodying features covered by said patents at prices less than, or upon terms contrary to those set forth in such Schedule of Minimum Prices and Terms, or in any new or amended schedule that may later be established in place thereof; and that nothing shall be given or sold or in any way disposed of by Licensee as a gratuity, bonus or rebate; and that no gratuity, bonus or rebate of any sort shall be in any other way directly offered or given; nor shall Licensee lease or rent or in any other manner temporarily place with a customer or user apparatus covered hereby in such manner as to directly or indirectly amount to a disposition of such apparatus on terms less than those set forth in such Schedule of Minimum Prices and Terms; nor shall Licensee in any way assist by extending facilities to the purchaser for installation of carbon dioxide fire extinguishing systems for the purpose of evading the minimum price provisions, nor shall anything be done in any other way for the purpose of indirectly accomplishing a sale to the customer of apparatus covered hereby at prices less than those set forth in such Schedule of Minimum Prices and Terms.

h. It is also agreed that sales agents shall not be selected from parties who can or may resell to themselves or to their subsidiaries thereby obtaining better prices, or who can in any way, by reason of their connections, accomplish a sale in a manner which would directly or indirectly have the effect of evading the intent of the Schedule of Minimum Prices and Terms.

i. It is also agreed that in the event any claim or claims of any patent covered by this agreement shall be declared invalid by a decision or decree (unappealed or unappealable) of a court of competent jurisdiction, apparatus covered only by such invalid claim or claims shall be thereafter considered without the scope of this agreement and may be made, used or sold by Licensee royalty-free and without compliance with the terms of any such Schedule of Minimum Prices and Terms.

j. Neither party will dispose of apparatus covered by this license otherwise than directly to the ultimate consumer or to the classes of customers mentioned in any such Schedule or Minimum Prices and Terms.

* * * * *

(15) It is agreed that unless sooner terminated as herein provided, the term of this agreement shall run to the expiry dates in the United States and Canada, respectively, of said United States Patent No. 1,760,274 (Minor), and said Canadian Patent No. 266,726 (Hiss) and said Canadian Patent No. 310,417 (Minor).

* * * * *

AGREEMENT.

This agreement made and entered into this day of December 30, 1944, by and between SPECIALTIES DEVELOPMENT CORPORATION, a New Jersey corporation, having its office and principal place of business at 60 West Street, Bloomfield, New Jersey, hereinafter referred to as "Licensor", which expression shall include its successors and assigns where the context so requires or admits, and the GENERAL PACIFIC CORPORATION, a California corporation, having its office and principal place of business at 1800 South Hooper Avenue, Los Angeles 21, California, hereinafter referred to as "Licensee", which expression shall include its agents, successors, assigns and controlled or subsidiary corporations where the context so requires or admits;

WHEREAS, Licensor is the sole owner of the following patents, viz.:

United States Patent No. 1,760,274 (Minor) issued May 27, 1930

Canadian Patent No. 266,726 (Hiss) issued Dec. 14, 1926

Canadian Patent No. 310,417 (Minor) issued Apr. 14, 1931.

The balance of this Agreement is the same as the Agreement dated December 1, 1944, between Specialties Development Corporation and The General Detroit Cor-

poration with the exception of the signature page which reads as follows:

SPECIALTIES DEVELOPMENT CORPORATION

By J. William Carson

President

ATTEST:

G. W. Hiss

Secretary

THE GENERAL PACIFIC CORPORATION

By G. D. Kite

President

ATTEST:

D. A. Clinton

Secretary

Walter Kidde & Company, Inc., affirming that it owns all of the stock of Specialties Development Corporation, hereby approves the foregoing agreement and guarantees its performance by the said Specialties Development Corporation.

WALTER KIDDE & COMPANY, INC.

By John V. Kidde

President.

ATTEST:

G. W. Hiss

Secretary.

Appendix P.

P—Government Exhibit 1, Part 20, page 3, amendment to one of the price schedules issued pursuant to patent licensing agreements in evidence as Government Exhibits 1, Part 1, and 1, Part 12. This amended schedule lists purchasers not to be appointed as selling sub-licensees or agents.

LIST OF PURCHASERS NOT TO BE APPOINTED AS SELLING (SUB-)LICENSEES OR AGENTS.

HARDWARE STORES WITHOUT OUTSIDE SALESMEN

This class includes all retail hardware stores which stores normally sell to a small area and which stores do not have a man who regularly solicits sales from consumers outside of the store.

AIRPLANE MANUFACTURERS AND AIRPLANE ASSEMBLERS EXCEPT AS PROVIDED FOR IN SCHEDULE A, CLASS G, OF THE LICENSE SCHEDULE.

This class includes any individual or company which manufactures and/or assembles planes in part or in whole.

AIRPLANE SUPPLY COMPANIES EXCEPT AS PROVIDED FOR IN SCHEDULE A, CLASS G OF LICENSE SCHEDULE.

This class includes all companies manufacturing and/or handling the sale of equipment or parts used on airplanes.

INSURANCE BROKERS, AGENTS AND COMPANIES.

This class includes any individual or company handling the sale of any type of insurance.

PURCHASING COMPANIES AND/OR COOPERATIVE PURCHAS- ING COMPANIES.

This class includes all individuals, companies, clubs and fraternities engaged in the business of buying or ar-

ranging for their client to buy equipment and material from various manufacturers and then allowing their clients part or all of the discount allowed by the manufacturer. For instance, Biddle Purchasing Company and any Farmer's Cooperative Purchasing Agency would be included in this class.

ARCHITECTS, DESIGNERS, AND CONSULTING ENGINEERS
EXCEPT AS PROVIDED FOR IN SCHEDULE A, CLASS D.

This class includes all architects, designers, and consulting engineers who may be in a position to recommend or purchase the equipment, except those in the marine field which are allowed a discount as provided for in License schedule, Schedule A, Class D.

MAIL ORDER HOUSES AND CHAIN STORES HAVING
BRANCHES OR WAREHOUSES IN SEVEN OR MORE
STATES.

This class includes such organizations as Sears Roebuck, Montgomery Ward, Pep Bros., Western Auto Supply, and similar organizations.

AUTO SUPPLY STORES WITHOUT OUTSIDE SALESMEN.

This class includes all retail auto supply stores which do not have a man outside regularly soliciting business.

DEPARTMENT STORES.

This class includes all stores whose major business is in household equipment, men's clothing and women's clothing and which stores may have a small Sports Department or Marine Dept., such as Macy's, Gimbel's, Wanamaker's and similar stores.

* * * * *

REISSUE ORIGINAL ISSUE.

MR 6/28/39 Effective August 1, 1939 U.S.A. Only

Appendix Q.

Q—Government Exhibit 1, Part 32.

—10a—68

WALTER KIDDE & COMPANY

Incorporated

140 Cedar Street - New York

GE 1-w d-7/21

Cable Address

WALTKIDDE

July 22, 1941

Mr. Stewart Boal, Personal
Fyr-Fyter Products Co.
318 West Randolph Street
Chicago, Illinois

Dear Mr. Boal:

I have your letter of July 17 and I am sorry, too, you could not come into see us. I had inquired if you had come in in my absence.

All sales matters, of course, are under Mr. A. M. Doxsey, Vice-President in charge of sales and Mr. Freck does assist him in connection with matters as they relate to your problem. I have spoken to both gentlemen and I think both feel something constructive could be worked out.

I really do believe it is quite difficult to accomplish anything of this kind by mail. There are many problems which ought to be considered both from your angle and from ours. I am wondering if you are planning to come in to New York sometime later on? Of course, right now the vacation season is in full swing; in fact, I shall be away the month of August but will probably be in Chicago, just passing through, for a few hours on August 4th, on my way to Denver.

Commenting on your letter, you speak of the 4-lb. size to be sold to W. D. Allen and Sears Roebuck through jobbers and dealers. You probably have found out that according to the law, if you sell to any jobber or dealer you sever all possible control of the sales price and for that reason we never would consider such a sales policy ourselves nor would the licensing company have any of its licensees sever title excepting to the ultimate consumer. An outfit like Sears Roebuck we would not even consider. As a matter of fact, they don't sell but only take orders and then usually the inducement is a cut price as they like to hide under someone else's umbrella. It is only through this very definite and consistent policy that the carbon dioxide industry has stayed on a profitable basis.

I note your order 1709 for 21—2½ gallon Kidde water extinguishers. Here again, we are in the same boat. This is a patented article under license and the Fyr-Fyter Company of Dayton holds such a license. As I understand it, Fyr-Fyter Products Co. is merely a sales agency and is owned by the Fyr-Fyter Company of Dayton and as the license is to the company and its subsidiaries, the Fyr-Fyter Products Co. gets a license. When Fyr-Fyter Products Co. sells to a client, it is a direct sale to the consumer and what the company (Fyr-Fyter of Dayton) does to reimburse its own salesmen is their own business. It is a commission they (the salesmen) receive. It is not a sale made at one price with title passed and then resold. Price control cannot operate under the second case.

Sheet 2—Date 7/21/41—To Mr. Stewart Boal

Therefore, applying this now to your order 1709, when you send us an order for 21—2½ gallon water extinguishers, you are the purchaser and the ordinary client prices must apply; namely, your price on this quantity is

now \$11.25 each and on August 1st \$13.00 each. If we sold them to you for anything less, we would have to pay liquidating damages to the other licensees. However, when you receive the order from your client and supply the material through Fyr-Fyter of Dayton (the licensee) naturally they can pay you a commission because they are not severing title to you. Therefore, the only thing I can do in this instance is to return the order to you (and it is enclosed herewith) and have you rout it through the licensee, Fyr-Fyter of Dayton.

The above seems quite complicated but yet it is simple when you understand it.

You speak of making sales direct to New York. I have looked this up and we do not make sales direct to Fyr-Fyter Products Co. of New York. They are made entirely through Dayton. What the arrangements are between Dayton and New York is none of our business. Of course, it does happen now and then that Fyr-Fyter of New York will telephone us and tell us an order is coming through Dayton but we recognize only the order from Dayton as the order and we bill Dayton in accordance with their order.

It might be a constructive idea if Roscoe Iddings, you and I sit down sometime and try to work something out. What do you think of this idea?

Very truly yours,

WALTER KIDDE & COMPANY, Inc.

Walter H. Freygang

Walter H. Freygang

Senior Vice-President

Appendix R.

R—Record references in support of the trial court's findings of fact and conclusions.

Explanation of Symbols.

S—Stipulation As to Facts.

SD—Stipulation With Respect to Documents.

R—Record.

SS—Supplemental Stipulation As to Facts.

G—Government Exhibit.

FINDINGS OF FACT.

In accordance with the request of defendants C-O-Two Fire Equipment Company and Maynard A. Laswell, and pursuant to the provisions of Rule 23(c) of the Rules of Criminal Procedure for the District Courts of the United States, the Court finds the following facts:

Definitions.

As used in these findings:

(a) "Defendants" refers to and includes all of the corporate defendants named in the indictment, and Maynard A. Laswell, Vice President of the defendant C-O-Two Fire Equipment Company, an individual defendant named in the indictment;

(b) "Fire extinguisher" refers to portable carbon dioxide fire extinguishers;

S 2, R 13.

(c) "Dealers" refers to corporations or individuals engaged in the business of buying or otherwise acquiring fire extinguishers from the corporate defendants herein for the purpose of resale or distribution to the ultimate

purchasers thereof, and includes jobbers, merchants, fire equipment companies, fire protection companies, hardware stores, and other merchandising agencies;

S 3, R 13.

(d) "Southern California area" includes that part of the State of California south of approximately 35 degrees, 45 minutes latitude, including specifically the Counties of Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura.

S 4, R 13.

The Defendants.

1. The defendant Walter Kidde & Company, Inc., hereinafter sometimes referred to as Kidde, is a New York corporation. Its plant and principal place of business are located at Belleville, New Jersey.

SD 1, R 31.

2. The defendant C-O-Two Fire Equipment Company, hereinafter sometimes referred to as C-O-Two, is a Delaware corporation. Its plant and principal place of business are located at Newark, New Jersey.

SD 3, R 31.

3. The defendant American-LaFrance-Foamite Corporation, hereinafter sometimes referred to as LaFrance, is a New York corporation. Its plant and principal place of business are located at Elmira, New York.

SD 4, R 31.

4. The defendant The General Pacific Corporation, hereinafter sometimes referred to as Pacific, is a California corporation. Its plant and principal place of business are located at Los Angeles, California. The Gen-

eral Detroit Corporation, a corporation with its plant and principal place of business at Detroit, Michigan, is not a defendant herein. It owns more than 70% of the stock of defendant Pacific. Pacific and The General Detroit Corporation commenced to manufacture, sell, and ship fire extinguishers in interstate commerce about the year 1942.

SD 2, R 31; S 9, R 6; S 10, R 7; R 185-186.

The Product and Commerce Involved.

5. Fire extinguishers are manually operated and are designed primarily to combat and extinguish fires in their incipient or early stages. Fire extinguishers are usually available in readily accessible places for instantaneous use in extinguishing fires in large buildings, industrial plants, offices, and other places. Municipalities and other governmental agencies, as well as industrial and mercantile organizations, are among the purchasers of such extinguishers.

S 5, R 13.

6. The component parts for corresponding models of the fire extinguishers manufactured or assembled by the corporate defendants, including the containers, valves, and horns, are substantially identical as to size, color, and other physical characteristics. The models of the defendants' fire extinguishers are so standardized that they are generally distinguishable only by the manufacturers' labels contained thereon.

R 150-152 incl.; Appendix B; Government's Exhibit 7, page 1.

7. Each corporate defendant is engaged in the business of manufacturing, selling, and shipping of fire extinguishers in interstate commerce. The defendants Kidde.

C-O-Two, LaFrance, and Pacific manufacture fire extinguishers at their respective plants located in the States of New Jersey, New York, and California, and ship and sell such fire extinguishers from such plants in interstate commerce to points located throughout the United States, including the Southern California area.

S 6, R. 14.

8. The defendants Kidde, C-O-Two, and LaFrance ship and sell fire extinguishers in a continuous flow of interstate commerce into the Southern California area, shipping said fire extinguishers to

(a) ultimate purchasers in the Southern California area who order directly from said defendants;

(b) ultimate purchasers in the Southern California area whose orders are forwarded to said defendants by dealers;

(c) dealers in the Southern California area; and

(d) warehouses in the Southern California area for distribution and sale to dealers or ultimate purchasers in such area.

S 7, R 14.

9. In 1947 the total annual volume of sales of fire extinguishers of the defendant corporations and The General Detroit Corporation constituted approximately 91% of the total dollar volume of sales of all fire extinguishers sold in the United States.

S 25-26, R 26.

Background of Offense Charged.

10. During the period from August, 1932 to about the year 1942, defendants Kidde, C-O-Two, and LaFrance

were the only manufacturers of fire extinguishers in the United States.

R. 185-186.

11. On August 24 and 25, 1932, defendant Kidde entered into identical patent licensing agreements with defendants C-O-Two and LaFrance, respectively, licensing said defendants under certain United States and Canadian patents relating to carbon dioxide fire extinguishers, including United States Patent No. 1760274.

Appendices M, N, O; Government Exhibit 1, Parts 1, 2, 12 and 13.

12. In or about March, 1940 Specialties Development Corporation, a wholly-owned subsidiary of defendant Kidde, acquired all of the rights of defendant Kidde as licensor under the agreements described in paragraph 11 hereof, and the right to issue additional licenses under the patents referred to in said agreements.

Appendix T; Government's Exhibit 1, Parts 4 to 7 incl., and 14 to 19 incl.

13. There is a division of territory between The General Detroit Corporation and defendant Pacific, pursuant to which defendant Pacific limits its sales of fire extinguishers to thirteen western states, including that portion of the State of California described herein as the Southern California area. The General Detroit Corporation confines its sales of fire extinguishers to the remaining portion of the United States.

S 11, R 16.

14. In December, 1944 defendant Pacific and its parent company, The General Detroit Corporation, accepted a license from Specialties Development Corporation under certain United States and Canadian patents relating to

carbon dioxide fire extinguishers, including United States Patent No. 1760274.

Government's Exhibit 1, Parts 21 to 31 incl.;
Appendix O.

15. The licensing agreements, referred to in paragraphs 11 and 14 hereof, terminated in the United States on or about May 27, 1947, the expiration date of United States Patent No. 1760274.

Appendices M, N, O; Government's Exhibit 1,
Parts 24 and 25.

16. The licensing agreements, referred to in paragraphs 11 and 14 hereof, reserved to the licensor the right to require the licensees therein to sell, or otherwise dispose of, any fire extinguishing apparatus using any features covered by the licensed patents at prices not less than, or upon terms different from, those established by the licensor.

Appendices M, N, O; Government's Exhibit 1,
Parts 1, 2, 24 and 25.

The Offense Charged.

17. Commencing at or about the time of the expiration of United States Patent No. 1760274, referred to in paragraph 11 hereof, and the expiration of the so-called patent licensing agreements referred to in paragraphs 11 and 14 hereof, and continuing up to and including the date of the return of the indictment, all of the defendants were parties to a combination and conspiracy to fix, determine, establish, and maintain non-competitive prices, terms, and conditions relating to the sale of fire extinguishers to ultimate purchasers in the Southern California area.

All references under Findings of Fact 18 to 29 inclusive.

18. During the period from August 24, 1932 to May, 1947, while the license agreements referred to in paragraphs 11 and 14 hereof were in effect, and during the period from May, 1947 to the date of the return of the indictment herein, the prices, terms and conditions of sale, under which fire extinguishers manufactured by the corporate defendants were sold to ultimate purchasers in the Southern California area, were substantially identical except for relatively short periods of time while price changes were being put into effect.

Government's Exhibit 1, Parts 1, 2, 12, 13, 18, 20 to 31 incl., 34; Appendices A to T incl.

19. The defendant C-O-Two had no cost records or other data indicating the manner or method of computing the sale price of the fire extinguishers manufactured and sold by it.

R 109-110.

20. The corporate defendants herein, at various times during the period of the combination and conspiracy described in paragraph 17 hereof, published and distributed price lists among their respective dealers which contained the agreed-upon and identical prices at which the corporate defendants and their dealers would sell their respective fire extinguishers in the Southern California area.

Government's Exhibit 1, Part 34; Appendices A, A-1, A-2; Exhibit 7; Appendix B; Government's Exhibit 8.

21. During the period of the combination and conspiracy described in paragraph 17 hereof, the corporate defendants sold substantial quantities of the fire extin-

guishers manufactured by them directly to ultimate purchasers in the Southern California area at identical prices, which were the published net, "delivered consumer" prices of each of said defendants referred to in paragraph 20 hereof. The balance of the fire extinguishers manufactured by the corporate defendants, and sold in the Southern California area during the same period, were sold by the corporate defendants to dealers at their established discounts from the identical net, delivered consumer prices as published by each of the corporate defendants in their respective price lists referred to in paragraph 20 hereof. Substantially all of such fire extinguishers were sold by said dealers to the ultimate purchaser at the published net, delivered consumer prices of the respective defendants upon the dealer's understanding that his particular supplier defendant required such fire extinguishers to be sold at such prices.

Government's Exhibit 1, Part 34; S 27, R 26, 27;
SS 3, 4, 5, R 28, 29; Appendices A, C.

22. The corporate defendants herein agreed not to sell or deliver fire extinguishers manufactured by them to dealers who failed to maintain and adhere to the prices, terms, and conditions of sale agreed upon and fixed by the defendants for the sale of fire extinguishers to ultimate purchasers in the Southern California area.

Government's Exhibit 1, Parts 20, 29 and 32;
Appendices P, Q; SS 3, 4, 5, R. 28-29.

23. The corporate defendants herein required their dealers to maintain and adhere to the prices, terms, and conditions of sale agreed upon and fixed by the defendants as the prices, terms, and conditions of sale for fire

extinguishers sold or delivered by such dealers to ultimate purchasers in the Southern California area.

Government's Exhibit 1, Parts 20, 29, 32, 34, 48, 49, 50; Government's Exhibit 6, SS 3, 4, 5, R 28-29.

24. The corporate defendants herein instructed their respective dealers to maintain and adhere to the delivered prices set forth in their respective price lists, referred to in paragraph 20 hereof.

Government's Exhibit 1, Parts 20, 29, 32, 34, 48, 49, 50; Government's Exhibit 6, SS 3, 4, 5, R 28, 29.

25. The corporate defendants agreed to quote and cause their dealers to quote and submit identical bids for fire extinguishers manufactured and sold by them, when bids for such extinguishers were called for by public and governmental agencies in the Southern California area, which bids were in accordance with and at the prices fixed and agreed upon for the sale of fire extinguishers to ultimate purchasers in said area. The corporate defendants, or their respective dealers, submitted identical price bids for fire extinguishers to the City of Los Angeles, Department of Water and Power, in or about May, 1948, and to the Purchasing Agent of the County of Los Angeles in or about August, 1948.

Government's Exhibit 1, Parts 43 to 50 incl.; Government's Exhibits 2, 3, 4, 5; R 80 to 97 incl.; SS 3, 4, 5, R 28, 29; Appendices C, D.

26. In May, 1948 and again in August, 1948, the defendant C-O-Two caused its selling agent in the Los Angeles area to police two of its dealers who had submitted bids to the City of Los Angeles and to the County

of Los Angeles on terms more advantageous to the City and County than those published in the price lists of the defendant C-O-Two. Such policing was for the purpose of compelling said dealers, under threat of refusal to furnish fire extinguishers, to withdraw their bids. As a result of such policing both dealers attempted to withdraw their respective bids. The dealer who had submitted the bid in May, 1948 was awarded the contract after an unsuccessful attempt to induce the City of Los Angeles to permit the withdrawal of its low bid. Thereafter said dealer requested the defendant C-O-Two to supply it with fire extinguishers so that it could fill the order received from the City of Los Angeles. After several letters and telegrams requesting delivery were directed by said dealer to defendant C-O-Two without reply, the dealer was advised by defendant C-O-Two that the defendant Laswell would contact it regarding said order. The order was thereafter filled following a conference between said dealer, the defendant Laswell, and a representative of the Los Angeles selling agent of defendant C-O-Two, during which the dealer was admonished by the defendant Laswell to refrain from further price cutting.

Government's Exhibit 1, Parts 35 to 42 incl.; Appendices E, F, G, H, I, J, K; Government's Exhibit 1, Parts 48, 49, 50, Appendix C; Government's Exhibit 1, Part 51, Appendix L; Government's Exhibits 2, 3, 4, 5, 6; Appendix D; R 80 to 97 incl.; SS 3, 4, 5, R 28, 29; R 111 to 139 incl.

27. The defendant Maynard Laswell, as Vice President in Charge of Sales of defendant C-O-Two, during the period of the combination and conspiracy referred to

in paragraph 17 hereof, instigated, determined, and supervised the prices and sales policies of defendant C-O-Two. He was a member of the Carbon Dioxide Committee of the Fire Extinguisher Manufacturers' Association, on which committee the other defendants were also represented. He policed and enforced the agreed-upon prices, referred to in paragraph 17 hereof, on the dealers of defendant C-O-Two in the Southern California area during the period of the price fixing conspiracy.

Government's Exhibit 1, Parts 35 to 42 incl., 51, Appendices E, F, G, H, I, J, K, L; R 111 to 139 incl.; R 187 to 192 incl.

28. There is an absence of price competition among the corporate defendants and among their dealers in the sale of fire extinguishers manufactured by the corporate defendants and sold to ultimate purchasers in the Southern California area.

All references under Findings of Fact 17 to 27 inclusive.

29. The interstate trade and commerce in the sale and distribution of fire extinguishers of the corporate defendants in the Southern California area has been unreasonably restrained, and the ultimate purchasers of fire extinguishers have been deprived of an open and competitive market in purchasing fire extinguishers in the Southern California area.

All references under Findings of Fact 17 to 27 inclusive.

30. The combination and conspiracy, described in paragraph 17 hereof, was carried out in part within the Southern District of California, Central Division.

All references under Findings of Fact 17 to 27 inclusive.

Appendix S.

S—Government Exhibit 1, Part 8.

SPECIALTIES DEVELOPMENT CORPORATION
60 West Street
Bloomfield, New Jersey

February 15, 1945

Please refer to:

1-LEG-JWC

C-O-Two Fire Equipment Company
Box 390
Newark, New Jersey

Attention: Mr. S. E. Allen
President

Gentlemen:

We deem it our obligation, in view of Article 8 of the License Agreement of August 24, 1932, with your Company, to submit a copy of the License Agreement entered into with The General Detroit Corporation on December 1, 1944; a similar License Agreement having been entered into with The General Pacific Corporation on December 30, 1944.

Very truly yours,

SPECIALTIES DEVELOPMENT CORPORATION

J. William Carson

J. William Carson

President

JWC:AMS
Enc.

Appendix T.

T—Government Exhibit 1, Part 7.

WALTER KIDDE & COMPANY
Incorporated
60 West Street - Bloomfield, N. J.

Cable Address
WALTKIDDE

April 4th, 1941

C-O-Two Fire Equipment Co.
10 Empire Street
Newark, New Jersey

Re: License Agreement Dated August 24, 1932

Gentlemen:

This letter supersedes our letter to you of August 14, 1940, on the subject of the license agreement between Walter Kidde & Company, Inc., and C-O-Two Fire Equipment Company of August 24, 1932.

You are hereby informed that on March 15, 1940, Walter Kidde & Company, Inc. acquired a majority of the voting stock of Specialties Development Corporation, 60 West Street, Bloomfield, New Jersey. On that date, therefore, Specialties Development Corporation acquired the status of a party benefited and bound by the agreement, under Article 26 thereof, which reads in part as follows:

“This agreement shall benefit and bind each party hereto, * * * any company the majority of whose voting stock is owned by such party, * * *.”

Walter Kidde & Company, Inc. has found it desirable to transfer certain rights under the agreement and in the patents upon which the agreement is based to Specialties as such party, but this agreement does not affect the rights or obligations of either C-O-Two Fire Equipment Company or Walter Kidde & Company, Inc., since all the rights and obligations originally standing in the name of Walter Kidde & Company, Inc. are now in the name of said Company and a "company the majority of whose voting stock is owned by" Walter Kidde & Company, Inc.

You are hereby authorized and requested to recognize and to deal with Specialties Development Corporation acting on its own behalf and as agent for Walter Kidde & Company, Inc., in all matters arising under the afore-said agreement on or after March 15, 1940.

Very truly yours

WALTER KIDDE & COMPANY, INC.
Walter H. Freygang,

By Walter H. Freygang,

Senior Vice-President

WHF:ID

No. 12,964

IN THE

United States Court of Appeals
For the Ninth Circuit

C-O-TWO FIRE EQUIPMENT Co. and

MAYNARD A. LASWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

FRANCIS R. KIRKHAM,

WILLIAM E. MUSSMAN,

RICHARD J. MACLAURY,

Standard Oil Building, San Francisco 4, California,

Attorneys for Appellants

and Petitioners.

PILLSBURY, MADISON & SUTRO,

Standard Oil Building, San Francisco 4, California,

Of Counsel.

FILED

JUN 27 1952

PAUL P. O'BRIEN

CLERK

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No. 12,964

IN THE

**United States Court of Appeals
For the Ninth Circuit**

C-O-TWO FIRE EQUIPMENT Co. and
MAYNARD A. LASWELL,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Most earnestly we ask this court for a rehearing. Most earnestly we urge that the court has misconceived our position and that the result is a grave miscarriage of justice.

Were this not a criminal case our plea of failure to make our position clear might merit less consideration. But in a criminal case we believe that we are not only warranted, but under obligation, to ask this court again to consider our true position. In this regard we note that the court said in its opinion (p. 3):¹

“* * * it might be said that this is a close case and from a consideration of all of the facts before him he

¹Page references are to the printed opinion from the clerk's office of this court.

[the trial judge] might have reached a different conclusion * * *."

And the court also pointed out (p. 3):

"All parties to this appeal agree that, substantially, none of the evidence produced at the trial was disputed. Most of the facts were either stipulated or admitted."

Thus the case presents purely a question of law.

In a most basic sense this court has misconceived our position. We do not

"* * * assert that the absence of direct evidence of a prearranged plan among the alleged conspirators is fatal to the prosecution" (p. 11).

Nor is it true that we make

"Much * * * of the dearth of direct evidence of conspiracy" (p. 5).

Nor do we contend that in the application of the rule with respect to circumstantial evidence the

"* * * rule must be separately applied to each link in the chain of circumstances and if one such unit does not fit the standard then the whole is likewise vulnerable" (p. 8).

On the contrary, we concur completely in the court's statement that conviction of a criminal conspiracy under the Sherman Act may be based upon circumstantial evidence, and that the circumstances must be viewed and considered together to determine whether from the course of conduct disclosed the only reasonable inference is that of guilt.

But we do assert that proof of a number of circumstances wholly innocent in themselves, and *all of which can reasonably coexist in a state of innocence*, cannot furnish the basis for conviction of crime.

From an analysis of this court's opinion, appellants understand that the court considers that each of the circumstances in this case, considered alone, is at least equivocal; each is consistent with either lack of conspiracy (innocence) or conspiracy (guilt). But it adopted the Government's theory that, when all the circumstances were considered together, guilt was established to a moral certainty and beyond every reasonable doubt.

On this petition for rehearing we earnestly ask the court to reconsider this holding. We submit that each of the circumstances mentioned by the court is a manifestation of, and consistent with, a competitive market in which no conspiracy exists, and that *all* of them reasonably can be expected to coexist in such a market and in the absence of a conspiracy.

In presenting this petition and in urging the point just stated we do not base our plea upon hypertechnical questions of logic and inference. We ask instead that the court consider and weigh carefully the plight of these appellants as businessmen. Mr. Allen, president of C-O-Two, and Mr. Laswell, each a respected member of the business community, took the stand and denied any participation in any combination or conspiracy with their competitors. This sworn testimony is now disregarded and labeled as false because of proof of a series of business actions which were taken by appellants over the course

of many years. Appellants, of course, admit these actions—they were openly taken in the normal course of carrying on their business. Appellants appeal to the court's recognition that all these activities could reasonably have been undertaken without any agreement or understanding with competitors.

The basis upon which this court affirmed the judgment of the court below, as we understand it, is this: The evidence shows that the defendants have charged identical prices for many years, dating back to and including the time when the prices were openly agreed upon as part of licensing agreements; this fact, together with other activities characterized as "plus factors," demonstrates to the point of certainty that the price-fixing agreements of the licenses were never abrogated and that prices throughout the many succeeding years have continued, in the same pattern, to be fixed by agreement.

We submit that the facts in this record do not permit this conclusion. We submit that the record incontrovertibly establishes that the price-fixing provisions of the license agreements were abrogated in 1942 and were never re-established.

We submit that the other activities of appellants relied upon by the Government and the court were and are entirely consistent with and to be expected in a competitive market, and that appellants have been convicted of crime on the basis of conduct which is wholly innocent and which is to be expected in the normal conduct of competitive business.

1. PRICING PRACTICES SINCE THE ABROGATION OF THE PRICE-FIXING PROVISIONS OF THE LICENSE AGREEMENTS.

In respect of the pricing practices since the abrogation of the price-fixing provisions of the license agreements—and this is the single dominant fact to which the court adds all its other “plus factors”—the court has misconceived the facts. In its opinion this court says (p. 12):

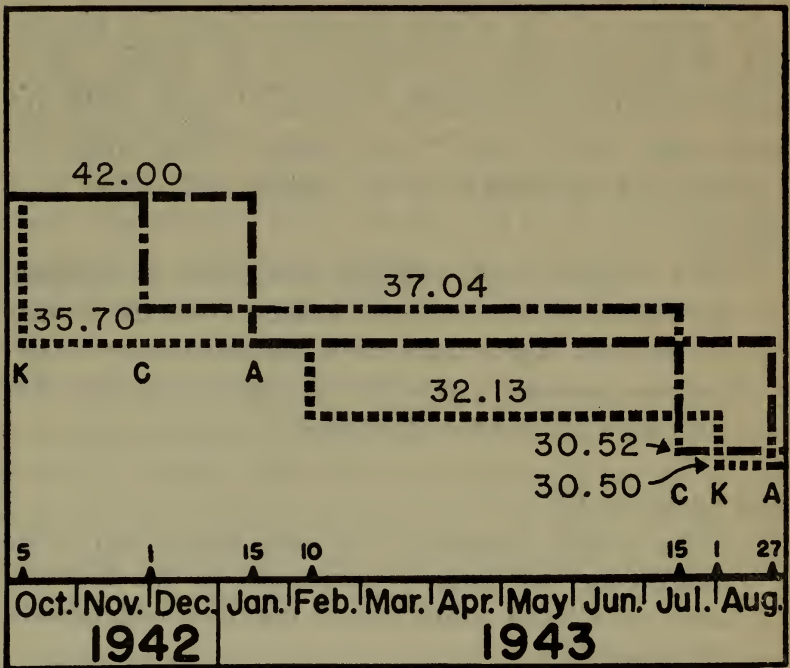
“* * * nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions, save for the bare statement that such provisions were abrogated.”

And again (p. 6):

“The record, however, does not reveal any price competition, as might be expected, in the industry after the alleged abrogation of the price maintenance provision.”

The facts of record do not support these statements. We do not know how American businessmen more conclusively could support the good faith and complete honesty of their statements that the price-fixing provisions of the license agreements in fact were terminated than by pointing to what the price lists introduced by the Government itself in this case show. Without reproducing the full price chart attached to our reply brief we print below (with the actual prices added) that section of the chart showing the pricing picture of the 10-pound model (the model selected by the Government for representative charting) during the 11

months following the abrogation of the price-fixing provisions of the license agreements in August, 1942.



C-O-Two Fire Equipment Co.
American-La France and
Foamite Industries, Inc.
Walter Kidde and Company, Inc.

C ———
A ———
K ———

For four and one-half years preceding the abrogation of the price-fixing provisions there was not one hour of one day during which the price of a *single* manufacturer for a *single* model varied by so much as a fraction of a cent.² *In contrast, after the price-fixing provisions were*

²Price chart attached to Reply Brief for Appellants. We again point out that this identity of price existed pursuant to a contractual arrangement the validity of which expressly had been approved at that time by the Supreme Court of the United States. See Reply Brief for Appellants, footnote 2, pp. 4-5.

abrogated, there was not one hour of one day in the entire 11-month period when the prices of all defendants were the same on a single model.

In the light of this showing we earnestly ask this court to reconsider its statements. It is difficult, we submit, to imagine what more dramatic demonstration of a complete break of a price-fixing agreement *could* be expected.

With this complete and undeniable break in the price-fixing pattern previously followed by the defendants under the pricing provisions of the license agreements, the conduct of the defendants over the succeeding years becomes entirely consistent with—and in fact affirmatively shows—a competitive pattern. Of course the price lists show that prices for these competitive products were the same during substantial periods of time. But it is uniformly recognized by the courts that identity of price for a standard product is to be expected in a competitive industry.³

And on the facts of this record the only reasonable conclusion is in accord with the sworn testimony of appellants, namely, that such identity of price as existed was the result of competition rather than collusion. In no single instance after August of 1942 were price changes simultaneous. On the contrary, in every instance the intervals of time elapsing between the date on which one manufacturer changed his prices and the dates on which the others met them were of such duration and diversity as to portray precisely the price pattern of a competitive industry, rather than one governed by conspiratorial behavior.⁴ More, there is a complete lack of uniformity

³See authorities cited in Reply Brief for Appellants, pp. 7-8.

⁴See Reply Brief for Appellants, pp. 30-32.

in the pattern of price changes. In the price moves since the war the first manufacturer to increase prices in two instances was C-O-Two, in two other instances, Kidde. The second manufacturer to meet the increased price in one instance was American-La France, in two instances, C-O-Two, and in one instance, General Pacific. Kidde was the last to meet the price on one occasion, General Pacific on another, and American-La France on still another. And this demonstration becomes conclusive, we submit, when the pricing conduct after August, 1942, is compared with that shown by this record to have existed during the period when prices were the result of agreement.⁵

2. BIDS TO PUBLIC AGENCIES.

The fact that on three occasions defendants quoted their list prices for relatively small quantities of fire extinguishers on bids called for by local governmental agencies in no way detracts from the foregoing record of price competition. This was brought out by the court and conceded by counsel for the Government at the oral argument (p. 67):

“Judge Pope: I suppose if they used the list prices in each of those cases they were identical.

Mr. Dixon: That is correct. The Government contends that that is the fact, and there isn't any evidence here to the contrary.

Judge Pope: If, for instance, they did that, I presume we may assume that they quoted those identical prices to private manufacturers who wanted these products * * *. If that is conceded, there isn't

⁵See price chart, *supra*.

anything added to the case, is there, by the fact that when the City of Los Angeles wanted fire extinguishers, they likewise gave identical list prices, price quotations to the City?

Mr. Dixon: No, I believe, Judge Pope, the fact that identical bids were submitted to the City or the County of Los Angeles is entitled to no greater weight than if they were submitted to an individual manufacturer."

3. NATIONAL DELIVERED PRICE.

In this case, for the first time in the history of the anti-trust laws so far as our research discloses, a Federal court has held that where each of a number of competitors in an industry follows the practice of selling its products to all of its customers at the same price, this is "circumstantial evidence of the existence of a conspiracy" between those competitors to fix prices (p. 12):

"Additional *circumstantial evidence of the existence of a conspiracy* as charged in the indictment is found in the fact that the corporate defendants charged identical consumer prices for their products regardless of where they may be sold in the United States."

This holding by a Federal court of appeals has such far-reaching implications as to warrant, we respectfully submit, this court's reconsideration. True, the court says (p. 13):

"* * * uniformity of delivered price does not in and of itself create inference of collusion, where such uniformity has 'simple and local explanations in the nature of the market, the product and the transportation costs.' "

But the court immediately goes on to say (p. 13):

“But appellants do not produce any such explanation here.”

Can it be that this court intends to hold that the Government establishes a *prima facie* case of conspiracy by showing—without more—that each of a number of competitors charges its customers the same delivered price throughout the country? Certainly the decision will be cited for such a proposition and certainly such a decision will fall with devastating impact upon American business. It is common knowledge that tens of thousands of products are priced at a single national delivered price.⁶ It is—we had thought—common knowledge that such a situation is entirely consistent with and characteristic of a competitive market. A “uniform delivered price at all points of delivery” has been expressly sanctioned by the Supreme Court of the United States, for the reason among others that it avoids possible conflict with the Robinson-Patman Act and like statutes dealing with discriminatory pricing:

“But it does not follow that respondents * * * may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price” (*Trade Comm’n v. Staley Co.* (1945) 324 U.S. 746, 757).

The citation of and quotation from *Milk and Ice Cream Can Institute v. Federal Trade Com’n* (7 Cir. 1946) 152 F.2d 478, 481, by this court (pp. 12-13) only adds breadth and serious significance to its decision. In the *Ice Cream*

⁶See survey of the Federal Trade Commission referred to at p. 35 of Reply Brief for Appellants.

Can case the members of the industry, acting through an association, adopted a complex and artificial freight equalization plan under which identical prices for each member (regardless of where located) were computed for every delivery point throughout the country. Prices at different delivery points throughout the country, of course, were different. Under this plan the respondents billed the purchaser the f.o.b. plant price plus freight and credited the purchaser for the difference between the freight billed *and the freight from the plant of the competitor located nearest to such purchaser*. The credits were computed from freight rate books prepared by the association and distributed to members. Often these books were used only for the quotation of price, and in making the actual shipments and determining the routes the members referred to other traffic information. Daily reports were received with respect to the freight charged and equalized, and deviations from the plan were policed.⁷

It was as to this situation the court in that case said:

“Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible to visualize.”

But this court now italicizes and applies this language to the simple practice of each of a number of competitors charging the same price to all of its customers throughout the country—a customary, accepted course of conduct by American business, involving no concurrence in artificial and complex formulae—and holds that following such a

⁷See Reply Brief for Appellants, pp. 45-46, headings 1, 2 and 3.

practice is “*Additional circumstantial evidence of the existence of a conspiracy*” (p. 12).

We earnestly ask this court to reconsider this ruling.

4. PRICE INCREASES AFTER THE WAR.

In its opinion, as an additional circumstance showing conspiracy, this court says (p. 13):

“Instead, a survey of market conditions in the fire extinguisher industry immediately after the last war indicates that although there was a substantial surplus of such extinguishers on the market (put there by the government), the defendant corporations increased their prices. Price increases which occur in times of surplus or when the natural expectation would be a general market decline, must be viewed with suspicion. Yet appellants offer no evidence to dispel doubts as to the legitimacy of their activities.”

Every line of the record supporting or bearing in any way upon this statement is on one page, reading as follows (R. 176):

“The Witness [Mr. Allen]: * * *

Now, we had to get our prices up and I know what applied to us applied to other manufacturers as well.

We had to get our prices up with the lowering of our volume and having to give increased compensation to our different dealers.

We were very, very happy to be able to get our prices up a little bit because we couldn't have existed on the prices that we had during the war.

Q. (By Mr. Lord): There was an unusual condition at the end of the war, was there not, war surplus?

A. Yes, Mr. Lord. As probably everybody knows the Government dumped tremendous quantities of our extinguishers on the market as surplus.

The Court: But that didn't prevent your prices from going up?

The Witness: No, it couldn't. We had to put them up. Their prices are still lower than ours—the surplus material is still being sold at a lower price than we sell it for. You can see them advertised in the Los Angeles papers here every Sunday. A 15-pound extinguisher will sell for \$25.00 or \$26.00 or \$27.00 which is actually, probably, lower than our cost if we put our overhead in it."

In all fairness we ask this court realistically to review this record and to reconsider whether the evidence warrants a finding that the postwar increase in prices by defendants "must be viewed with suspicion" because made "in times of surplus or when the natural expectation would be a general market decline" (p. 13).

During the war years prices of fire extinguishers were at their lowest point, because, as Mr. Allen testified, manufacturing volume was at a peak and sales costs were eliminated by direct sales to the Government (R. 175). After the war, volume dropped and the sales costs incident to civilian distribution were reimposed. It was because of "the lowering of our volume and having to give increased compensation to our different dealers" (R. 176) that it was necessary for C-O-Two to increase its prices.

In addition, as this court judicially knows, costs of labor and materials sharply increased. Fifteen-pound fire extinguishers were sold to the Government during the war, in tremendous quantity lots, at \$34.35 each, as compared with a pre-war price of \$49 each.⁸ Surplus extinguishers dumped on the market by the Government sold for as low as \$25 to \$27 each—prices below C-O-Two's actual cost of manufacture (R. 176).

It is, we submit, a matter of common knowledge that many war surplus materials were handled and stored under most adverse conditions; that their sales are not accompanied with the customary warranties and service guarantees of manufacturers for new products; that they do not sell at competitive prices with new products. We ask this court to recognize and hold that the conduct of appellants in increasing their prices to meet increased costs in the situation above disclosed may reasonably be considered that of honest businessmen, acting in a competitive market and not pursuant to conspiratorial conduct.

In this regard we point out that because of C-O-Two's increased costs it raised its prices in October, 1945. It was not until January, 1946, *three months later*, that any other manufacturer raised its prices.⁹ What stronger evidence could be presented of a company acting individually under the force of economic circumstances and without agreement or criminal conspiracy with its competitors.

⁸See R. 175 and price chart attached to Reply Brief for Appellants.

⁹See price chart, Reply Brief for Appellants.

5. C-O-TWO'S COST RECORDS.

In its opinion this court says (p. 5):

“It is significant that the trial court also found that appellant C-O-Two had no cost records or other data indicating the manner or method of computing the sale price of the fire extinguishers manufactured and sold by it.”

Most respectfully we refer the court to the statement in note 17 on pages 22 to 24 of Reply Brief for Appellants for a quotation of the record on this point and our comment thereon.

6. STANDARDIZATION OF PRODUCT.

The fact is undisputed that extinguishers of the same size manufactured by each of the defendants are virtually identical in appearance. But mere similarity in product cannot be a “plus factor” (i.e., a circumstance from which an inference of conspiracy *to fix prices for the product* can be drawn), in the absence of a showing—completely lacking here—that the standardization is artificial.¹⁰

Of course, certain products, such as clothing and jewelry, are manufactured to appeal to individual tastes. Of course, differences in color and design of such objects normally will be expected. But other products—in most cases strictly functional in nature—normally are expected to be similar in appearance, and such similarity will have not the slightest tendency to show conspiracy. It would not be supposed, we submit, that because shovels or rakes

¹⁰See Reply Brief for Appellants, p. 11, et seq.

or hoes or paint brushes or brooms are indistinguishable except for manufacturers' labels, an inference arises that standardization pursuant to a price-fixing conspiracy has occurred.

This is exactly the situation here. Extinguishers are industrial tools, functional in nature, manufactured in an assembly-line manner to meet a common industrial need. As was said at the oral argument (Tr. pp. 70-71):

“Judge Pope: I suppose there is no reason why a manufacturer of this kind of product would be interested in getting out an attractive looking extinguisher.

Mr. Dixon: No, I do not think there would be particularly, Judge. I suppose an extinguisher would do the job just as well if it were painted green or some other decorative color, but the fact is whether that would have some sales appeal to some people because it was painted a different color or not, I do not know.”

While there is nothing in the record so stating, both counsel for the Government¹¹ and the court in its opinion (p. 7) refer to the fact that the extinguishers of all defendants are the same color. Undoubtedly the court spoke from common knowledge that these extinguishers are red. The Government's argument, above quoted, suggests that certain manufacturers, if there had not been a conspiracy, might have painted their extinguishers some other color to test its sales appeal. We believe it is less reasonable to conclude that fire extinguishers are painted red by all manufacturers pursuant to a conspiracy, than

¹¹Transcript of oral argument, p. 54.

it is to conclude that, without any conspiracy at all, they are painted red like fire engines to associate them with their intended use and to make them prominently observable in the event of fire emergency. We do not believe that it would be reasonable for one manufacturer to paint them green, for example, when employees in industrial plants have a natural mental association between the color red and fire extinguishers.

The horn, also mentioned by the Government,¹² is placed on each extinguisher because of its essential function in fire extinction. We urge the court again to refer to *Randolph Laboratories v. Specialties Development Corp.* (D. N.J. 1949) 82 F.Supp. 316 (affirmed, 178 F.2d 477), for a clear and convincing statement of this function.

The significant fact in this case is not whether these ordinary industrial tools are similar, but whether the record admits of an inference of collusive action from the conduct of the parties in manufacturing and introducing new models. New models obviously are brought on the market for competitive reasons—to appeal to a different group of purchasers or to the same group for different needs. The record is uncontradicted that in not one single instance in the history of this industry was a new model introduced simultaneously; that, on the contrary, the shortest period of time which elapsed between the introduction of a new model by one of the defendants and the date on which a competitor introduced that model was six months.¹³

¹²Transcript of argument, p. 54.

¹³See Reply Brief for Appellants, pp. 15-17, and model chart attached to brief.

Surely, we submit, from such a competitive pattern the only reasonable inference is not conspiracy but the absence thereof.

7. DEFENDANTS WERE MEMBERS OF THE FIRE EXTINGUISHER MANUFACTURERS ASSOCIATION, INC., AND WERE REPRESENTED ON THE CARBON DIOXIDE COMMITTEE OF THAT ASSOCIATION.

We venture to say that every major industry in the United States has a trade association. The legality of such associations *per se* has never been questioned. Businessmen—counsel for businessmen—are now faced with a decision stating that mere membership in a trade association is a “plus factor” in finding a criminal conspiracy—*mere membership*, without proof by the Government of a single activity of the association. This goes beyond any recorded decision. More, businessmen will now read that it “cannot be denied” that meetings of the association will be viewed by the Government and may be viewed by a court as providing an “opportunity * * * to discuss and agree upon prices and pricing policies on an industry-wide basis.”

We submit that unless a presumption of guilt is to replace the presumption of innocence the fact of membership in the association and attendance at its meetings can raise *no* inference, be *no* “plus factor,” that defendants were engaged in a price-fixing conspiracy. On the contrary the fact that the Government with its broad powers of subpoena failed to find and introduce into evidence a single activity of the association which might be

criticized adds strongest credence to the sworn statements of appellants that at no time did they discuss or agree upon prices with their competitors.

8. SUGGESTED RESALE PRICES.

Here, again, the only evidence in the record is that each manufacturer suggested resale prices. And so do all businessmen wear shoes. Suggesting resale prices is an ordinary, lawful accompaniment to the sales of thousands upon thousands of products by American businessmen in all branches of trade.¹⁴ Indisputably, each of the defendant manufacturers had an understandable, reasonable economic interest in following this practice. The fact that each of them did so, we submit, does not even reasonably, let alone irresistibly, lead to the conclusion that they *agreed* to do so.

We read the court's opinion at page 8 as a holding that the stipulation quoted at pages 7-8 supports a finding by the trial court that the defendants required their dealers to maintain resale prices agreed upon by the defendants as a group.¹⁵ Most respectfully we submit that, if this be the court's holding, it cannot be sustained. The stipulation contains nothing bearing upon an agreement among the defendants except the admitted fact that each followed the practice of suggesting resale prices. And so

¹⁴Reply Brief for Appellants, footnote 20, p. 26; Transcript of Argument, p. 40, et seq., p. 58.

¹⁵Finding 23, R. 44.

far as it bears upon the conduct of each defendant, acting individually, it does not support, but on the contrary negatives, a finding that on any occasion any defendant required its dealers to maintain resale prices.¹⁶ The stipulation states that each of the dealers would testify that “*he understood*” that his manufacturer required its products to be sold at the published prices. But it does not state that the manufacturer required such resale prices or agreed with any dealer upon resale prices. Since this vital link in the chain of evidence was omitted from the stipulation (i.e., since the Government in effect stipulated that no dealer would so testify), and since the Government failed to supply this link by proof at the trial, the situation is like the one mentioned by Judge Bone at the argument in referring to the *Karn* case (p. 7, Transcript of Argument):

“Judge Bone: You could not possibly convict that fellow; that is, you could if you took one car out of the center of the train, you could say you would have two trains instead of one.”

And this point is made doubly clear by the fact that the stipulation characterizes the published prices as “suggested” prices, a term of well-known legal and factual significance (*not* “agreed upon” prices), and by the further fact that the stipulation states that the dealers “generally” followed these “suggested” prices “as a matter of sales policy” (p. 8):

¹⁶The additional evidence as to resale price maintenance referred to in the next subdivision of this petition relates to C-O-Two alone *and to no other manufacturer*.

“* * * that in reselling such fire extinguishers to consumers and users in the Southern California area, he or the corporation by which he was employed, as a matter of sales policy, generally adhered to the published consumer prices suggested by the defendant corporation whose product was being sold; * * *.”

9. THE EVIDENCE AS TO C-O-TWO AND ITS DEALERS.

It is only natural that this court should place much emphasis upon the two occasions when C-O-Two admonished its dealers in connection with off-list pricing on bids to governmental agencies. We have no protest in this regard. But earnestly we ask the court to realize that this very fact emphasizes what is so important to bear in mind in this case. The indictment here charges a price-fixing agreement—not between C-O-Two and its dealers, but between C-O-Two, Kidde, American-La France and General Pacific.

The above testimony as to C-O-Two has no relevancy to the conspiracy charged *unless that conspiracy be otherwise established* and the acts of C-O-Two be held overt acts pursuant thereto. As we have said,¹⁷ not a word in the record connects C-O-Two's actions with any other defendant, by agreement, participation or even knowledge. The record shows that the Government preceded this trial with extensive investigation under broad subpoenas (R. 109-110). It must be presumed that if it had found any evidence even remotely connecting any defendant with any “policing” activities of any other defendant,

¹⁷Reply Brief for Appellants, p. 25.

or even showing any "policing" activities undertaken independently by any defendant other than C-O-Two, it would have introduced such evidence. Instead the record is bare.

For the purpose of appraising whether this testimony tends to prove the conspiracy charged, it must be viewed not only from the standpoint of C-O-Two but from that of each of the other manufacturers. Most respectfully we urge that when so viewed—objectively—it has no tendency to support a finding of conspiracy among the manufacturing defendants and their officers.

We read the argument of counsel for the Government as recognizing this—as recognizing that to sustain the broad conspiracy charged recourse must be had to other circumstances.¹⁸ We submit that this is so, and that, as we have shown, the other circumstances—whether considered singly or collectively—do not spell out the "irresist-

¹⁸ "MR. DIXON: * * * But there again you may have that in this case. If you want to isolate it, certainly you have that as to the C-O-Two dealers here that were policed, but that isn't the charge made in this indictment, that just C-O-Two is doing it.

Besides the charge here is that you have a horizontal price fix, and I urge Your Honors, if you have not already done so, to read the specifications of the conspiracy as charged in this indictment, and certainly the charge is—and no demurrer or motion to dismiss was made, and I do not think it would apply, but Paragraph 5, for example,—Paragraph 12(f) of the indictment charges as one of the things that defendants agreed to do was to agree to quote and submit identical bids when bids were called for by public and governmental agencies in the Southern California area in accordance with the prices fixed for sales of fire extinguishers and to require any dealer submitting bids in competition with any of the defendant manufacturers to do likewise.

Mr. Kirkham says, 'There is no evidence here that anybody else, other than the C-O-Two dealers, were policed.' Of course not. The only time you have policing, Your Honor, is when they step out

ible conclusion" that the "charges of the indictment were true beyond a reasonable doubt" (p. 6).

CONCLUSION.

So far as our research discloses in no other antitrust case, criminal or civil, has the Government relied upon proof which is so lacking in probative force as in this case. We repeat that we do not complain of the fact that the evidence is circumstantial nor that the circumstances are not considered piecemeal instead of as a whole. But we do submit that these circumstances cannot reasonably be added together to sustain a finding of conspiracy, since each of them considered alone is consistent with innocence *and* all of them considered together are consistent with each other and reasonably can co-exist in a state of innocence.

We respectfully refer the court to the many representative cases we reviewed in our brief¹⁹ where a finding of conspiracy was sustained on circumstantial evidence.

of line and the evidence here shows none of the other dealers stepped out of line on these bids. Why should they be policed?

JUDGE BONE: You think that creates an inference that justifies a conviction in a criminal case. That must be your case.

MR. DIXON: That is one of the factors, Your Honor.

JUDGE BONE: That is one of the plus factors in the case.

MR. DIXON: That is right. There are many other things here. We have specified and outlined them in our brief. In other words, there is what we call a background here. That standing alone does not convict anybody, and I do not mean to tell this Court that if that is all there was here there never would have been any indictment, but there are several other things that I would like to mention in passing, and this is in the stipulation again" (Tr. of Oral Argument, pp. 60-61).

¹⁹Reply Brief for Appellants, pp. 39-54.

In each it will be seen that, unlike the instant case, all the circumstances relied upon could not reasonably be expected to co-exist in the absence of the conspiracy charged.

We know of no better way to test the validity of what we have said than to look at the actual business situation now confronting these defendants in respect of those practices which this court has held are circumstantial evidence of crime.

It is true C-O-Two can abstain from ever admonishing a dealer. But, as pointed out above, this does not even touch the heart of the conspiracy alleged or the circumstances which have been found to evidence it.

Must one or more defendants now charge different prices than its competitors, and, if so, how long will the defendant charging the highest price remain in business? And how can any company prevent a competitor from meeting its prices?

Must one or more of the defendants abandon its practice of charging the same price to all of its customers throughout the country? If so, it still must charge a price competitive with whatever price other manufacturers are charging or lose its business.

Must each defendant resign from the trade association or at least never attend a meeting?

Must each now devise some method to change the shape or style of its products so as to make them differ from those of its competitors? The horn, an essential functional part, cannot be eliminated. Is it reasonable to ask any one to abandon the red color?

In sum, must defendants artificially and consciously be different to escape the "irresistible inference" that their normal similarities are criminal?

We concur in the repeated statements of the courts that the Sherman Act expresses a policy vital to our democratic institutions. We believe it to be a policy endorsed by the overwhelming majority of American businessmen. But the fair objectives of this policy cannot, we respectfully submit, be achieved unless the same scrupulous regard be given to sustaining the fair and normal conduct of businessmen as is given to the condemnation of practices which do not meet that test.

For the reasons above stated we respectfully ask for a rehearing.

Dated, San Francisco, California,

June 27, 1952.

Respectfully submitted,

FRANCIS R. KIRKHAM,

WILLIAM E. MUSSMAN,

RICHARD J. MACLAURY,

Attorneys for Appellants

and Petitioners.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

June 27, 1952.

FRANCIS R. KIRKHAM,

*Of Counsel for Appellants
and Petitioners.*

